IN THE

Supreme Court of the United States

October Term, 1966

No. 249

WYATT TEE WALKER, MARTIN LUTHER KING, JR., RALPH ABERNATHY, A. D. KING, J. W. HAYES, T. L. FISHER, F. L. SHUTTLESWORTH and J. T. PORTER,

Petitioners,

v.

CITY OF BIRMINGHAM, a Municipal Corporation of the State of Alabama.

BRIEF FOR THE PETITIONERS

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Opinions Below

The opinion of the Supreme Court of Alabama (R. 429-447) is reported at 279 Ala. 53, 181 So.2d 493 (1965). The opinion of the Circuit Court for the Tenth Judicial Circuit of Alabama (Jefferson County) (R. 419-425) is unreported.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered December 9, 1965 (R. 447-448), and rehearing was denied January 20, 1966 (R. 449). On April 13, 1966, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to June 19, 1966 (R. 451). The petition was filed June 18, 1966, and was granted October 10, 1966 (R. 452). The jurisdiction of this Court rests on 28 U.S.C. §1257(3), petitioners

having asserted below and here the deprivation of rights secured by the Constitution of the United States.

Questions Presented

Petitioners, leaders of the civil rights movement in Birmingham, Alabama in 1963, conducted protest marches and other demonstrations against racial discrimination and segregation in that city. On application by the City, an Alabama state court issued an *ex parte* temporary injunction restraining petitioners from parading or demonstrating without a permit and from other vaguely defined "unlawful" activities. Petitioners have been convicted of criminal contempt of court for violating that injunction by demonstrating without a permit, and for issuing a press release critical of the injunction and of the Alabama courts.

The questions presented are:

(1) Whether the injunction and the Birmingham parade-permit ordinance with which it requires compliance are unconstitutional as vague, overbroad and censorial regulations of free speech, in violation of the First and Fourteenth Amendments?

(2) Whether, if the injunction was unconstitutional, petitioners may constitutionally be punished for disobedience of it? Specifically:

(a) Whether the refusal of the Alabama Supreme Court to entertain petitioners' First-Fourteenth Amendment challenge to the injunction rests upon an adequate and independent state ground?

(b) Whether, in view of the unconstitutionality of the ordinance, there is constitutionally sufficient evidence to support a finding that petitioners violated the injunction, prohibiting *unlawful* and unpermitted demonstrations?

(c) Whether, if the injunction's prohibition of *unlawful* and unpermitted demonstrations is retroactively read to restrain demonstrations protected by the First and Fourteenth Amendments, petitioners' contempt convictions are void under the Due Process Clause for want of fair notice, and for want of constitutionally sufficient evidence of contumacious intent?

(d) Whether, on this record, punishment of the petitioners for violating an *ex parte* temporary injunctive order prohibited by the First and Fourteenth Amendments itself violates those amendments?

(3) Whether the trial court, in this contempt proceeding, improperly deprived petitioners of the opportunity to present a federal constitutional defense to the charge of violating the court's injunctive order, by excluding all of the evidence proffered by them to show that Birmingham city authorities discriminated on grounds of race and arbitrarily repressed unpopular advocacy of civil rights in their administration of the parade permit ordinance under which permits were required to be obtained by the injunction?

(4) Whether petitioners M. L. King, Jr., Abernathy, Walker and Shuttlesworth were convicted of contempt of court in violation of the First and Fourteenth Amendments when their convictions rested in part upon charges that they issued a press release critical of the injunction against them and of the Alabama courts?

(5) Whether in the case of petitioners Hayes and Fisher, there is constitutionally sufficient evidence to support a finding that they had notice or knowledge of the terms of the injunction?

Constitutional and Statutory Provisions Involved

1. This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following ordinance of the City of Birmingham:

General Code of City of Birmingham, Alabama (1944), §1159

> It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public way of the city, unless a permit therefor has been secured from the commission.
>
> To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions.

3. The following Alabama statutes and Birmingham municipal ordinances involved are set out in the Appendix, *infra*, pp. 1a-3a.

Code of Alabama (Recompiled 1958), Title 13, §§4, 5, 9;

General Code of City of Birmingham, Alabama (1944), §§369, 597;

Building Code of City of Birmingham, Alabama (1944), §2002.1.

Statement

The petitioners are eight Negro ministers who were convicted of criminal contempt as a result of incidents arising out of their civil rights activities in Birmingham, Alabama, in April 1963. Specifically, they were charged with violating a temporary injunction which was issued *ex parte* and without notice by the Circuit Court on April 10, 1963 (R. 37), on the complaint of the City of Birmingham verified by City Commissioner Eugene "Bull" Connor and Police Chief Jamie Moore (R. 26-37). On April 26, 1963, petitioners were adjudged in contempt of the Circuit Court for the Tenth Judicial Circuit of Alabama, and sentenced to five days in jail and to pay $50 fines (R. 424-425), the maximum penalty permitted by Code of Alabama, Title 13, §9.[1] The Supreme Court of Alabama granted certiorari to review the case and stayed execution of the sentences pending review (R. 23). The convictions were affirmed

[1] There were 15 defendants in the trial court. The charges against four were dismissed by the trial judge (R. 424). The convictions of three others were quashed by the Alabama Supreme Court (R. 448).

by the Supreme Court of Alabama December 9, 1965 (R. 429, 447), and the stay was continued in effect pending review in this Court (R. 449).

Petitioners are officers and members of the Southern Christian Leadership Conference (S.C.L.C.), and its affiliate, the Alabama Christian Movement for Human Rights (A.C.M.H.R.).[2] The organizations, described as Negro protest organizations concerned with civil rights and racial integration, sought to eliminate racial segregation by legal means, and peaceful protests (R. 219, 320). A state investigator assigned to study racial problems (R. 218) testified that the organizations' "teachings have been nonviolent" (R. 220), and that "The general theme is nonviolence in every program" (R. 221). He felt that they "were supposedly teaching nonviolence but yet psychologically they were advocating violence" (R. 220). Further evidence of the petitioners which described their program and the situation to which it was addressed was excluded as irrelevant at the trial; they made a proffer on this subject (R. 297-298).[3]

1. *Events Prior to the Injunction.*

On April 3, 1963, a member of the A.C.M.H.R., Mrs. Hendricks, was sent by Rev. Shuttlesworth to the Birmingham City Hall to inquire about permits for picketing,

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[2] The Rev. Dr. Martin Luther King, Jr. is President of S.C.L.C., Rev. Wyatt Tee Walker was Executive Director of S.C.L.C., Rev. Fred L. Shuttlesworth was President of A.C.M.H.R. (R. 205).

[3] Petitioners offered to prove that "the Alabama Christian Movement for Human Rights is an organization seeking to eliminate segregation in the City of Birmingham through constitutionally protected activity such as free speech and picketing" and that "there is extensive segregation in the City of Birmingham" and the organization was "seeking to eliminate that segregation through peaceful protests against that policy on the part of the City officials" (R. 297).

parading and demonstrating; she was accompanied by a Baptist minister (R. 353-355). At the City Hall she went first to the Police Department, spoke with a police officer at the desk, Mr. Clayburn, and asked "to see the person or persons in charge to issue permits, permits for parading, picketing and demonstrating" (R. 353). She then went to the office of Commissioner Eugene "Bull" Connor (Public Safety Commissioner of the City of Birmingham (R. 288)). She testified:

> I went to Mr. Connor's office, the Commissioner's office at the City Hall Building. We went up and Commissioner Connor met us at the door. He asked, "May I help you?" I told him, "Yes, sir, we came up to apply or see about getting a permit for picketing, parading, demonstrating" . . . (R. 354).
>
> • • •
>
> I asked Commissioner Connor for the permit, and asked if he could issue the permit, or other persons who would refer me to, persons who would issue a permit. He said, "No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail," and he repeated that twice (R. 355).[4]

On April 5, 1963, petitioner Shuttlesworth sent a telegram to Commissioner Connor requesting a permit to picket "against the injustices of segregation and discrimination" on designated sidewalks on April 5th and 6th, and stating "We shall observe the normal rules of picket-

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[4] Mrs. Hendricks' testimony was not contradicted; however, the Court granted the City's motion to exclude it from the record saying, "I don't think the statement of Mr. Connor would be binding on the Commission" (R. 355).

ing" (Exhibit B, R. 350, 416).[5] Within a few hours, Mr. Connor wired back a reply:[6]

> UNDER THE PROVISIONS OF THE CITY CODE OF THE CITY OF BIRMINGHAM, A PERMIT TO PICKET AS REQUESTED BY YOU CANNOT BE GRANTED BY ME INDIVIDUALLY BUT IS THE RESPONSIBOITY (sic) OF THE ENTIRE COMMISSION. I INSIST THAT YOU AND YOUR PEOPLE DO NOT START ANY PICKETING ON THE STREETS IN BIRMINGHAM, ALABAMA.
>
> EUGENE "BULL" CONNOR, COMMISSIONER OF PUBLIC SAFETY
>
> (Exhibit A, R. 289, 415.)[6]

Petitioners made an effort to offer further proof with respect to the administration of the Birmingham parade permit ordinance (City Code §1159, quoted *supra*, pp. 4-5), but the Court sustained the City's objections to questions

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[5] The telegram stated: "DEAR MR. CONNOR, THIS IS TO CERTIFY THAT THE ALABAMA CHRISTIAN MOVEMENT FOR HUMAN RIGHTS REQUEST A PERMIT TO PICKET PEACEFULLY AGAINST THE INJUSTICES OF SEGREGATION AND DISCRIMINATION IN THE GENERAL AREA OF SECOND THIRD AND FOURTH AVENUES ON THE EAST AND WEST SIDEWALKS OF 19 STREET ON FRIDAY AND SATURDAY APRIL FIFTH AND SIXTH. WE SHALL OBSERVE THE NORMAL RULES OF PICKETING. REPLY REQUESTED."

[6] On the next day, April 6, Shuttlesworth wired Commissioner Connor, Birmingham Police Chief Jamie Moore, and County Sheriff Melvin Bailey, stating that a group of not more than thirty persons would accompany him to City Hall for a brief prayer service, and specifying the route they would follow approaching and leaving City Hall, that they would block no doors or sidewalks, where the group would disperse, that it would be orderly, and that they would proceed "no more than two abreast strictly observing all traffic signals" (Exhibit C, R. 361, 367, 417). Chief Moore said that no action was taken on the telegram (R. 363). The marchers were arrested for parading without a permit (R. 42, 72-73).

about the general practice (R. 281-287). Petitioners' counsel stated that he wanted to "ascertain what is the nature of marches, or parades in which permits are granted" and "inquire into the procedure to see how these are acquired" (R. 282). Counsel stated that he planned to prove through the city clerk that:

> "The City Commission does not grant permits and never has; that these are granted by the City Clerk at the request of the traffic division according to no published rule or regulation. We can establish it very easily because that is in fact the practice" (R. 284).

The city clerk, who was also secretary to the Commission (R. 281), testified that he kept a record of permits issued for parades (R. 283). However, he was not allowed to answer whether the Commission had ever voted to grant a parade permit (R. 283). When the witness was asked to describe the practice for granting permits, the Court sustained an objection, saying:

> I think the question asking for the general practice in such instances cannot be allowed because the ordinance itself which is governing this situation allows certain discretion in the City Commission, and to attack the act of the Commission in this proceeding would not be relevant (R. 284).

The witness did testify that there were no published rules and regulations concerning the manner of applying for parade permits apart from the City Code (R. 286). Petitioners' counsel's statement as to the practice, quoted above (R. 284), was accepted as an offer of proof (R. 287). The city clerk testified that petitioners had not appeared before the City Commission to request a permit (R. 287). Petitioners also offered to prove by Commissioner Connor's

testimony "that the City Commission has never issued any permit" in any case, but objections to the questions were sustained (R. 290). Commissioner Connor was asked whether any picketing of any kind was permitted in Birmingham, but objections to this question were also sustained (R. 290-291).

Chief Inspector Haley, second ranking officer on the police force (R. 145), said that he had seen various parades in the city, and did not recall having made arrests for any parade that had a permit; said that he got notice of parades through the Chief's office; and referred to some parades as being "legal" (R. 178).

The City did not present any testimony with respect to any of the parades or other demonstrations before the date of the injunction, and petitioners were not allowed to put on evidence about the demonstrations prior to the injunction (R. 295-297). Some of these demonstrations resulting in arrests of demonstrators are described in affidavits by police officers and counter-affidavits by demonstrators which were attached to the pleadings (R. 39-43, 70-81).[7]

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[7] The police affidavits mentioned five sit-in demonstrations where there were arrests for "trespass after warning" and four episodes where pickets or marchers were arrested for parading without a permit during the period April 3 to April 10, 1963 (R. 39-42). Counter-affidavits by demonstrators were filed stating their version of the same incidents (R. 70-81). The marchers and pickets were arrested for parading without a permit under City Code Section 1159, *supra*, p. 4. The demonstrators alleged that the trespass after warning arrests were efforts by the City to enforce a city ordinance requiring separation of the races in restaurants, City Code Section 369 (text at R. 69) (R. 67). This was the ordinance involved in *Gober* v. *Birmingham*, 373 U.S. 374 and the trespass prosecutions were dismissed after that decision. The bulk of the prosecutions for parading without a permit under section 1159, are still pending awaiting the outcome of *Shuttlesworth* v. *City of Birmingham*, 43 Ala. App. 68, 180 So.2d 114 (Section 1159 held unconstitutional), now pending on certiorari in the Alabama Supreme Court.

2. *The Injunction—April 10, 1963.*

At 9:00 p.m. on the evening of April 10, 1963 (R. 37), the City filed a Bill of Complaint (R. 25-37), verified by Commissioner Connor and Chief Moore, seeking injunctive relief against 138 named individuals and two organizations, S.C.L.C. and A.C.M.H.R., and presented it to the Hon. W. A. Jenkins, Circuit Judge. Among the 138 individuals named as respondents in that complaint were six of the eight petitioners in this Court.[8] The City alleged that from April 3 through April 10 "respondents sponsored and/or participated in and/or conspired to commit and/or to encourage and/or to participate in certain movements, plans or projects commonly called 'sit-in' demonstrations, 'kneel-in' demonstrations, mass street parades, trespass on private property after being warned to leave the premises by the owners of said property, congregating in mobs upon the public streets and other public places, unlawfully picketing private places of business in the City of Birmingham, Alabama; violation of numerous ordinances and statutes of the City of Birmingham and State of Alabama; . . ." It was alleged that this conduct is "calculated to provoke breaches of the peace" and "threatens the safety, peace and tranquility of the City" (R. 31-32). There were allegations with respect to several lunch counter demonstrations and processions on the streets (R. 32-33); a claim that the conduct placed "an undue burden and strain upon the manpower of the Police Department"; a statement that no "kneel-in" demonstration had occurred "up to the present time," but that the conduct alleged was "part of a massive effort . . . to forcibly integrate all business establishments, churches and other institutions" in the City

[8] The petitioners named in the complaint were the Reverends Walker, M. L. King, Jr., A. D. King, Shuttlesworth, Abernathy and Porter (R. 25). Petitioners J. W. Hayes and T. L. Fisher were not named in the Bill of Complaint.

and that "respondents are conspiring to and will conduct 'kneel-in' demonstrations at the various churches . . . in violation of the wishes and desires of said churches unless enjoined therefrom" (R. 35).

Immediately and without notice, Judge Jenkins issued a temporary injunction restraining:

> the respondents and the others identified in said Bill of Complaint, their agents, members, employees, servants, followers, attorneys, successors and all other persons in active concert or participation with the respondents and all persons having notice of said order from continuing any act hereinabove designated particularly: engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or like demonstrations without a permit, trespass on private property after being warned to leave the premises by the owner or person in possession of said private property, congregating on the street or public places into mobs, and unlawfully picketing business establishments or public buildings in the City of Birmingham, Jefferson County, State of Alabama or performing acts calculated to cause breaches of the peace in the City [fol. 77] of Birmingham, Jefferson County, in the State of Alabama or from conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations, unlawful boycotts, unlawful trespasses, and unlawful picketing or other like unlawful conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama or from doing any acts designed to consummate conspiracies to engage in said unlawful acts of parading, demonstrating, boycotting, trespassing and picketing or other unlawful acts, or from engaging in acts and conduct customarily known as "kneel-ins" in churches in

violation of the wishes and desires of said churches (R. 38).

Six of the petitioners were served on April 11 and April 12; the court below found that petitioners Hayes and Fisher (who were not named in the complaint) "were not served with a copy of the injunction until after the Sunday march" (R. 445), but concluded on the basis of the testimony that "each of them had knowledge of the injunction prior to that parade" (R. 445), and sustained their convictions. A detailed and complete statement of the evidence concerning notice to Reverends Hayes and Fisher is set forth below in the portion of the Argument urging that they were convicted on a record containing no evidence that they had knowledge of the terms of the injunction (*infra*, pp. 76 to 80).

3. ***Speeches and Statements on April 11, 1963.***

The City's evidence was that when the injunction was served Rev. Shuttlesworth said, "speaking of the injunction handed to him: 'This is a flagrant denial of our constitutional privileges'" (R. 194). A newsman described Shuttlesworth's reaction:

> "In no way will this retard the thrust of this movement." He said they would have to study the details. He said, "An Alabama injunction is used to misuse certain constitutional privileges that will never be trampled on by an injunction. That is what they were saying that particular night right after the injunction" (R. 194).

At the same time, Rev. Abernathy made the statement, "An injunction nor anything else will stop the Negro from obtaining citizenship in his march for freedom" (R. 194).

Later, on April 11 at around 12:45 p.m., there was a press conference attended by Revs. Martin King, Abernathy and Shuttlesworth; Rev. Walker distributed a press release which Dr. King read aloud (R. 248-249). The text of the statement, quoted in full in the opinion of the Alabama Supreme Court (R. 431-433) (Complainants' Exhibit 2; R. 409-410) is set out in the note below.[9]

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[9] The press release said:

In our struggle for freedom we have anchored our faith and hope in the rightness of the Constitution and the moral laws of the universe.

Again and again the Federal judiciary has made it clear that the privileges guaranteed under the First and the Fourteenth Amendments are too sacred to be trampled upon by the machinery of state government and police power. In the past we have abided by Federal injunctions out of respect for the forthright and consistent leadership that the Federal judiciary has given in establishing the principle of integration as the law of the land.

However we are now confronted with recalcitrant forces in the Deep South that will use the courts to perpetuate the unjust and illegal system of racial separation.

[fol. 483] Alabama has made clear its determination to defy the law of the land. Most of its public officials, its legislative body and many of its law enforcement agents have openly defied the desegregation decision of the Supreme Court. We would feel morally and legal responsible to obey the injunction if the courts of Alabama applied equal justice to all of its citizens. This would be sameness made legal. However the issuance of this injunction is a blatant of *difference* made *legal*.

Southern law enforcement agencies have demonstrated now and again that they will utilize the force of law to misuse the judicial process.

This is raw tyranny under the guise of maintaining law and order. We cannot in all good conscience obey such an injunction which is an unjust, undemocratic and unconstitutional misuse of the legal process.

We do this not out of any disrespect for the law but out of the highest respect for *the* law. This is not an attempt to evade or defy the law or engage in chaotic anarchy. Just as in all good conscience we cannot obey unjust laws, neither can we respect the unjust use of the courts.

We believe in a system of law based on justice and morality. Out of our great love for the Constitution of the U. S. and our desire to purify the judicial system of the state of Alabama, we risk this critical move with an awareness of the possible consequences involved.

Police Lt. House said that after King read the statement, Shuttlesworth read another statement "more or less re-affirming" what had been said by King (R. 250); and that Rev. King said "The attorneys would attempt to dissolve the injunction, but we will continue on today, tomorrow, Saturday, Sunday, Monday and on" (R. 252).

At a meeting in a church on the evening of Thursday, April 11, King and Abernathy made speeches. Mr. Stanton, a radio station news director, testified that Dr. King said, "Injunction or no injunction we are going to march tomorrow" (R. 243); and that King also said, "In our movement here in Birmingham we have reached the point of no return" and "Now Mr. Connor will know that the injunction can't stop us" (R. 244).[10] He said Reverend Abernathy led a call for volunteers, and Rev. Shuttlesworth led the singing (R. 245). Mr. Stanton testified that Rev. Abernathy made the statement, "I feel better tonight because tomorrow me and Dr. King are going to jail" (R. 246). Another witness said that at the series of meetings during April, they were recruiting people who were willing to go to jail (R. 203).

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[10] J. Walter Johnson, an Associated Press reporter gave a different account of King's speech on the evening of April 11th. With respect to the speeches by King and Abernathy, he said "The word 'injunction,' itself, never did come up that I can remember or see offhand. They did speak of boycotts, and boycott was included with the entire movement" (R. 188). He said that King's speech had to do with a boycott of stores "until Negroes can use the lunch counters" (R. 189).

Johnson said that King said "Abernathy and I will make our move on Good Friday, symbolizing the day Jesus hung on the cross," and that "We must love all white persons, we must love even Bull Connor" (R.190). Abernathy said, "I am against white supremacy, I am against black supremacy, I am against any kind of racial supremacy" (R. 191).

Mr. Johnson was asked if there was any occasion when any of them used the word "march" at all, and he responded "Not that I have, no, sir." (R. 191).

4. *Events on Friday, April 12, 1963—"Good Friday."*

All of the testimony about the events on the afternoon of April 12, 1963, was given by two law enforcement officers, W. J. Haley, Chief Inspector of the Birmingham police force,[11] and Lt. Willie B. Painter, investigator for the Alabama Department of Public Safety.[12]

The police had advance information that there would be a march on Friday from a church at 16th Street and Sixth Avenue to the City Hall (R. 146): Chief Inspector Haley was telephoned by Rev. Wyatt Tee Walker who said that he was calling for Martin Luther King, and that "they intended to make a march on City Hall at 12:15" (R. 180; see also R. 176). Haley could not remember the date he received this call but knew that it referred to the Good Friday march. Haley told Walker "that in my opinion that would be a violation of the City ordinance and instructed him that unless he obtained a permit for the same we would have to arrest him, and asked him to convey that information to Martin Luther" (R. 180).

A crowd gathered in and around the church on Friday from noon until about 2:00 p.m. (R. 206, 155). There were 350 to 400 people inside the church (R. 148) and a large crowd of Negroes gathered nearby on the sidewalks, in private yards and in a large park near the church (R. 148, 161). Inspector Haley said that there were eighty or eighty-five policemen in the area (R. 340). The officers were able to keep the sidewalks and street clear (R. 182, 224), and made no effort to disperse the crowd which was milling around the area (R. 161, 223-224). The police blocked off vehicular traffic before the march (R. 160, 163).

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[11] Chief Inspector Haley's testimony about the Friday events is at R. 145-148, 155-156, 159-164, 171-172, 175-176, 180-184 and 340.

[12] Lt. Painter's testimony about the Friday afternoon events is at R. 206-209, 222-225, 229.

At about 2:00 p.m., Lt. Painter saw Revs. M. L. King, Abernathy and Shuttlesworth arrive in a car driven by Rev. Walker, and enter the church (R. 207). Walker drove away (R. 207). "A short time thereafter a group came out of the church and began what appeared to be a parade or a march in the direction of downtown Birmingham" (R. 207). "The group was led by Rev. Martin Luther King, Jr., Rev. Ralph Abernathy, Rev. Shuttlesworth" and others (R. 207).

Haley said that the ministers and the group following them "were marching on the sidewalks two abreast" and were evenly spaced (R. 156). He estimated "there were approximately, I would say, fifty or sixty in the original march. Well, more than fifty, because fifty-one were arrested" (R. 147). The ministers at the front of the march were wearing long black robes over their suits (R. 184). The marchers were orderly,[13] carried no signs or placards (R. 175), and did not cross against any red lights or violate any traffic regulations (R. 160). They remained on the sidewalk (R. 163, 229) and walked about two blocks before they were stopped by the police where fifty-one marchers, including petitioners Martin King, Abernathy and Shuttlesworth, were arrested for parading without a permit (R. 146, 147, 175).

Inspector Haley said that there were a "large number of on-lookers, or by-standers, that were not participating in the actual march" who were "clapping and hollering and hooping on the sidelines" (R. 146). He estimated that there were "between one thousand and fifteen hundred that were not participating in the actual marching" who were following and in various places in the area (R. 147). He said,

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[13] Asked if the marchers were orderly, Haley said: "The marchers, as far as I know, didn't use any profanity. They were not taunting like the crowd" (R. 163). He also said that they did not push anyone off the sidewalk (R. 163).

"They were following the marchers, but not in the procession. Most of them were on the south side of the street, and the marchers had started on the north side . . ." (R. 146). After the arrest of the marchers, according to Haley, this crowd got "unruly" and three people were arrested "one or two for loitering . . . and possibly one for resisting arrest, loitering and resisting" (R. 147). There was no evidence of violence or anything of that nature during or after the Good Friday march led by King, Abernathy and Shuttlesworth.

Afterwards the crowd returned to the church where there was a song and prayer service on the steps (R. 209). The only petitioner, other than King, Abernathy and Shuttlesworth, who was mentioned as being present on Friday was Rev. Walker.[14] As the march proceeded, Walker walked along with Lt. Painter and police Lt. Ralph Holmes following the marchers (R. 208). There was no testimony that Walker was walking in the march and he was not arrested.[15] "A short time after the arrests," Painter observed Rev. Walker standing "in the middle of the block in the park . . . waiving his arms" and directing people passing him to "make one circle around the park"; but the police ordered them to disperse and they assembled at the church steps for the song and prayer service (R. 208-209).

Neither of the police witnesses maintained that either the marchers or the crowd of onlookers blocked the streets on Friday. Chief Inspector Haley testified (R. 160):

> Q. At the time these individuals were marching did they march against any red lights or violate any traffic regulations, anything of that sort? A. To my knowl-

[14] There was no testimony that petitioners A. D. King, Hayes, Fisher or Porter were involved in the Friday march.

[15] Haley did not see Walker that day (R. 171).

edge they did not. I couldn't observe all of it. My attention was focused on the crowd and not on the lights. The streets were wholly blocked off, so it would not have made any difference so far as vehicular traffic was concerned.

Q. Did the marchers block the streets off or did the Police Department block the streets? A. The Police Department had previously blocked the vehicular traffic off.

And similarly (R. 163):

Q. Then after the marchers came out they did not block any traffic or impede the free movement of people on the streets, did they? A. The traffic was already blocked for the marchers.

Q. The traffic was already blocked by the Police Department? A. By the Police Department.

Lt. Painter's testimony was in accord: "The streets were basically kept open" (R. 225).

Inspector Haley stated that the police did not allow any white people (except press and policemen) to come into the Negro area where these events occurred (R. 170); that there was never any "direct conflict or any direct contact between" any whites and Negroes (R. 182); and that the police department was able to maintain law and order, although he thought this was "hard" (R. 181-183).

5. *Events on Sunday, April 14, 1963—"Easter Sunday."*

On Sunday, April 14, 1963, the police received "advance word" (R. 149) that there would be a march from the Thurgood C.M.E. Church (R. 165, 311) at Seventh Avenue and Eleventh Street north toward the City Jail (R. 149). Beginning around 2:30 or 3:00 p.m., a crowd began to

gather for about an hour and a half and a service began inside the church (R. 214). Again the police assigned 80 or 85 men to the area (R. 340), and they allowed the crowd to congregate on streets and sidewalks in the area (R. 166),[16] making no effort to disperse them (R. 228, 267). The police "blocked off the area," rerouted all vehicular traffic away from the area, and kept white people out of the neighborhood (R. 154). The officers established a "blockade" two blocks from the church to stop the march (R. 216). Estimates of the total crowd in the area ranged as high as 1,500 to 2,000 people (R. 150, 231).[17]

Lt. Painter saw Rev. Walker "forming a group of people two or three abreast" outside the church (R. 214). Later a group came out of the church and began walking at a rapid rate along the sidewalk (R. 215). This group was led by several ministers wearing robes, including petitioners A. D. King, Porter, Hayes and Smith (R. 266-267), walking two abreast (R. 169, 265, 266), down the sidewalk (R. 266). Petitioner Fisher was also in the group (R. 302). (Petitioners M. L. King, Abernathy and Shuttlesworth, who had been jailed on Friday, were *not* in the Easter march.) The ministers walked a short distance, leading an estimated 50 people (R. 233, 234, 235). Officer Higginbotham observed them coming "out of the church in two's side by side" and proceeding "on the sidewalk" (R. 266). When they were "marching north between 10th and 11th streets through a vacant lot" (R. 267), Higginbotham asked if they had a

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[16] Inspector Haley said: "They were standing on people's steps, standing in people's yards and just various places. Actually, I would say most of them were on private property. There were some of them that were on the sidewalk, but not enough to constitute a blockage or to cause a police problem because the traffic department was there to take care of any traffic hazards that might come up" (R. 166).

[17] Lt. Painter's estimate was lower—"eight hundred or a thousand people in the church and outside the church" (R. 214).

parade permit and when they said they did not (R. 268), he placed Revs. Porter, A. D. King, Hayes and Smith under arrest (R. 269). Rev. Fisher was also arrested (R. 302). The total number arrested was said to be "in the twenties" (R. 150, 168).

When the ministers began their walk from the church, about three or four hundred people in the crowd which had gathered outside began proceeding in a mass down the middle of the street (R. 156-157, 158).

The officers said that the crowd was singing and shouting and that there was "a lot of heckling going on" (R. 269) and that they were jeering and cursing and belittling the police (R. 153). But officer Higginbotham said that the ministers were "not loud or boisterous" (R. 268) and that when arrested they "did not resist in any respect" and walked with him to the patrol wagon (R. 269).

One woman was arrested and she resisted arrest (R. 150-151), but Chief Inspector Haley said that "She was not a member of the marchers. She was not dressed as a churchgoer" (R. 150; see also 183). While the woman was being subdued by the police several rocks were thrown, one narrowly missing the arresting officer, another hitting a motorcycle, and another hitting a news photographer (R. 15, 216-217, 231-233). Three people who threw the rocks were immediately taken into custody by the police (R. 183, 217); they were not identified by name at this trial, nor was there any claim that they were among the marchers. Indeed, Inspector Haley stated that the episode of rock throwing occurred after the twenty marchers were arrested (R. 183). There were no other episodes of violence during the demonstration (R. 184).

Lt. Painter said that the police then moved out of the area and the Negroes began walking back toward the

church, where he saw Rev. Wyatt Walker beckoning the people to come inside (R. 217).

6. *Proceedings in the Courts Below.*

On April 15, 1963, petitioners filed a motion to dissolve the injunction in which they asserted that the injunction denied them due process of law under the Fourteenth Amendment because it was issued without notice to them, because it was excessively vague, because it was a prior restraint on free speech protected by the First Amendment, because it was designed to enforce the city restaurant segregation law, because it was based upon a complaint which described only constitutionally protected conduct, and because the parade ordinance upon which it was based was excessively vague (R. 65-68). Petitioners also filed a demurrer (R. 120-122), an answer (R. 122-124), and an amended answer (R. 132-134) to the bill for injunction in which they raised similar constitutional claims.

The court set a hearing on the motion to dissolve for April 22, 1963 (R. 82).

Later, on April 15, the City of Birmingham filed a motion for an order to show cause why petitioners should not be held in contempt for violating the temporary injunction (R. 82-90). The court issued an order directing petitioners to appear on April 22 and show cause why they should not be punished for contempt of court (R. 92-94).

At the beginning of the hearing the court ruled that even though petitioners had filed their motion to dissolve first, it would consider the contempt charge first (R. 139).

In response to the show cause order, petitioners filed a "motion to discharge and vacate order and rule to show cause" saying that they had not violated the injunction because it prohibited engaging in or encouraging others

to engage in "unlawful" conduct specified therein, whereas the petitioners' conduct was lawful conduct protected by the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Petitioners also said that the original bill for injunction upon which the temporary injunction was based did not show that they had engaged in unlawful conduct but that they had engaged in conduct protected by the First and Fourteenth Amendments (R. 125-126).

In their answer to the petition for a show cause order, petitioners described the lawful conduct protected by the First and Fourteenth Amendments in which they had engaged:

> a) Walking two abreast in orderly manner on the public sidewalks of Birmingham observing all traffic regulations with prior notice having been given to city officials in order to peacefully express their protest against continuing racial discrimination in Birmingham.
>
> b) Peaceful picketing in small groups and in orderly manner of publicly and privately owned facilities.
>
> c) Requesting service in privately owned stores open to the general public in exercise of their right to equal protection of the laws and due process of law which are denied by Section 369 of the 1944 General City Code of Birmingham (R. 128-129).

Petitioners' motion for a severance of civil and criminal contempt charges against them (R. 127, 140), was denied (R. 140).

After the City rested, and again at the end of the trial, petitioners moved "to exclude the evidence," in an oral

motion (R. 272, 370), later reduced to writing (R. 135), in which they asserted that there was no evidence showing why they should be punished for contempt based on "the statements made publicly at press conferences and mass meeting on April 11, 1963," since the evidence showed that they had "engaged only in activity protected by the First Amendment and by the due process clause of the Fourteenth Amendment to the Constitution of the United States." Petitioners T. L. Fisher and J. W. Hayes asserted that there was no evidence showing that they were served with copies of the court's injunctive order of April 10, 1963, prior to their arrest and imprisonment for parading without a permit on April 14, 1963 (R. 135-137).

The issues at the trial were subsequently specified by the Supreme Court of Alabama by quoting (R. 437) a colloquy which occurred during the hearing:

> During the hearing on the charge that petitioners had violated the injunction, the trial court stated the issues presented by the evidence as follows:
>
> The Court: The only charge has been this particular parade, the one on Easter Sunday and the one on Good Friday, and on the question of the meeting at which time some press release was issued. Am I correct in that?
>
> Mr. McBee: Essentially that is correct.
>
> The Court: I don't know of any other evidence or any other occasions other than those, and I see no need of putting on testimony to rebut something where there has been no proof along that line.

At the outset of its opinion adjudging petitioners in contempt, the trial court noted that the petitioners were charged with violating the temporary injunction "by their

issuance of a press release . . . which release allegedly contained derogatory statements concerning Alabama courts and the injunctive order of this Court in particular" (R. 420). The opinion said they were "further" charged with violating the injunction by participating in and conducting certain parades in violation of a city ordinance prohibiting parades without a permit (R. 420). The court stated that as these were "past acts of disobedience and disrespect for the orders of this court and the nature of the orders sought would be to punish the defendants" the proceeding was "an action for criminal contempt" (R. 420). The court subsequently found generally that "the actions" (without further specification) of petitioners were "obvious acts of contempt, constituting deliberate and blatant denials of the authority of this Court and its order" (R. 422).

In response to petitioners' claim that their acts were lawful because constitutionally protected by the First and Fourteenth Amendments, the trial court held that Section 1159 (the parade permit ordinance) "is not invalid upon its face as a violation of the constitutional rights of free speech as afforded to these defendants in the absence of a showing of arbitrary and capricious action upon the part of the Commission of the City of Birmingham in denying the defendants a permit to conduct a parade" (R. 422). Judge Jenkins cited *Cox* v. *New Hampshire*, 312 U.S. 569, to sustain the parade ordinance (R. 422). The Court then said that "legal and orderly processes" required defendants to attack an unreasonable denial of a permit by a motion to dissolve the injunction, and that since this was not done, "the Court is of the opinion that the validity of its injunction order stands upon its *prima facie* authority to execute the same" (R. 422).

In their petition for certiorari to the Supreme Court of Alabama, petitioners made substantially the same claims

as below, asserting that the judgment of contempt denied rights secured by the First and Fourteenth Amendments in that the punishment constituted a prior restraint on freedom of speech, association, and the right to petition for redress of grievances; that the injunction was excessive and vague, contrary to the due process clause of the Fourteenth Amendment, particularly in the context of an order restraining First Amendment rights; that the City of Birmingham failed to produce evidence which showed that petitioners did anything other than exercise constitutional rights of free expression; and that, therefore, the contempt decree was based on no evidence of guilt, in violation of the due process clause of the Fourteenth Amendment (R. 21-22).

The Alabama Supreme Court held that because petitioners admittedly continued protest demonstrations after the injunction issued, they violated the order against engaging in parades without permit (R. 437-438). The Court said, "Petitioners rest their case on the proposition that Section 1159 of the General City Code of Birmingham, which regulates street parades, is void because it violates the First and Fourteenth Amendments of the Constitution of the United States, and, therefore, the temporary injunction is void as a prior restraint on the constitutionally protected rights of freedom of speech and assembly" (R. 439-440). The Court held that "the circuit court had the duty and authority, in the first instance, to determine the validity of the ordinance, and, until the decision of the circuit court is reversed for error by orderly review, either by the circuit court or a higher court, the orders of the circuit court based on its decision are to be respected and disobedience of them is contempt of its lawful authority, to be punished" (R. 444). It therefore affirmed petitioners' convictions for contempt.

Summary of Argument

I.

The trial court adjudged petitioners in contempt of court for violation of its injunctive order without affording them an opportunity to prove that by the racially discriminatory withholding of parade permits city authorities prevented them from doing what the injunctive order required.

The court denied petitioners an opportunity to prove: that Birmingham city authorities discriminatorily administered the parade permit ordinance and assumed arbitrary and censorial control over the use of the city streets by abuse of the permit power; that these authorities wrongfully refused for racial reasons to grant permits for peaceful civil rights demonstrations; that these authorities, in order to deny petitioners their federal constitutional rights of free speech and equal protection of the laws, applied for, and obtained from the trial court the *ex parte* injunction which forbade the petitioners to conduct demonstrations; and that the same authorities, by manipulation of the procedures of the permit-application process, and abuse of their discretion in passing on requests for permits, wilfully violated the Equal Protection Clause in denying petitioners the permits to demonstrate required by the parade permit ordinance and injunctive order.

This abuse of the state judicial process denied petitioners due process of law and equal protection of the laws. Petitioners were entitled to a hearing on the contempt charges before being convicted, *Re Green,* 369 U.S. 689, and, at that hearing, they were entitled to an opportunity to prove their federal constitutional defense to the criminal charge, *Carter* v. *Texas,* 177 U.S. 442, 448-49; *Coleman* v. *Alabama,* 377 U.S. 129, 133. Under *Yick Wo* v. *Hopkins,*

118 U.S. 356, racially discriminatory administration of the permit ordinance to which this injunction commanded obedience was such a defense.

II.

Petitioners' contempt convictions are based upon an injunction which orders obedience to the Birmingham parade ordinance. That ordinance is unconstitutional because it grants unfettered administrative discretion to regulate free expression, and in other regards as well is a vague and overbroad encroachment on First Amendment rights. Additionally, the injunction is unconstitutionally vague, in violation of the First and Fourteenth Amendments.

Because the injunction is void, reversal of petitioners' convictions must follow, for four independent reasons:

A. Review by this Court of petitioners' First and Fourteenth Amendment objections to the injunctive order is required because the refusal of the Alabama Supreme Court to entertain those objections does not rest on an adequate and independent state ground. Alabama courts, as a practical matter, exercise discretion to hear the kind of federal claim disallowed by the court below. Moreover, petitioners were fairly entitled to believe that they could raise their federal claim defensively in the contempt proceeding.

B. The injunctive order against petitioners prohibited only *unlawful* and unpermitted parades and demonstrations. In the absence of any indication of contrary construction placed upon it by the courts below, this order must be read consistently with the Supremacy Clause as prohibiting only unpermitted parades and demonstrations for which the State of Alabama could constitutionally demand a permit. Since petitioners' permitless activities were at worst in violation of a constitutionally invalid permit ordinance,

there is no evidence within the standard of *Thompson* v. *Louisville,* 362 U.S. 199, to support a finding that they acted unlawfully within the meaning of the injunction.

C. If the injunctive order is construed, contrary to its apparent meaning, to prohibit unpermitted parades and demonstrations protected by the federal Constitution, petitioners' convictions must nevertheless be reversed for two reasons. First, such a reading of the order deprives them of the fair warning demanded by the Due Process Clause. Second, there is no evidence within the standard of *Thompson* v. *Louisville, supra,* to support a finding of contumelious intent where what is shown is that petitioners complied with the apparent meaning of the order and relied upon clearly controlling decisions of this Court in thinking their demonstrations lawful.

D. Assuming, *arguendo,* contrary to arguments II (A), (B) and (C) above, that petitioners did willfully violate the injunction after adequate notice, and that regular and consistently applied Alabama procedures forbid testing the invalidity of an injunction in a contempt proceeding, these procedures may not constitutionally be applied to punish petitioners for disobeying this federally unconstitutional injunction. The doctrine ordinarily associated with *United States* v. *United Mine Workers,* 330 U.S. 258, should not be extended to the limit of its logic so as to invade the province of First Amendment freedoms, especially in a case, such as this, involving a vague and overbroad, patently unconstitutional state injunction, issued *ex parte,* effecting wholesale repression of speech during the only time when it could be effective as an instrument of social action.

To extend *Mine Workers* into the area of free expression would sanction an intolerable prior restraint. This is especially true here, where the incorporation of the Birmingham parade ordinance into the injunction renders city admin-

istrators the censors of the streets. The legitimate concern of preserving respect for the courts does not countenance destruction of individual rights through judicial fiat. *Johnson* v. *Virgina*, 373 U.S. 61; *Hamilton* v. *Alabama*, 376 U.S. 650.

III.

Petitioners Martin King, Abernathy, Walker and Shuttlesworth were unconstitutionally punished for criminal contempt for publishing a press release criticizing the injunction and Alabama officials. Issuance of the press release was one of the several acts of contempt charged and thus part of the basis for the trial court's general adjudication of guilt. As this charge is constitutionally vulnerable their convictions must be reversed. *Thomas* v. *Collins*, 323 U.S. 516, 529; *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287; *Terminiello* v. *Chicago*, 337 U.S. 1.

The press release criticizing the injunction as an "unjust, undemocratic and unconstitutional misuse of the legal process" and criticizing Alabama officials for preserving segregation was constitutionally protected speech. *Garrison* v. *Louisiana*, 379 U.S. 64; *New York Times Co.* v. *Sullivan*, 379 U.S. 254; *Wood* v. *Georgia*, 370 U.S. 375; *Bridges* v. *California*, 314 U.S. 252; *Pennekamp* v. *Florida*, 328 U.S. 331; *Craig* v. *Harney*, 331 U.S. 367.

IV.

Petitioners J. W. Hayes and T. L. Fisher were denied due process because there was no evidence of an essential element of criminal contempt. *Thompson* v. *Louisville*, 362 U.S. 199; *Fields* v. *City of Fairfield*, 375 U.S. 248. Hayes and Fisher were not parties to the injunction suit or served with the order before their alleged contemptuous

conduct. To prove contempt under Alabama law it is therefore necessary to establish that they had notice of the injunction's restraints and were familiar with its provisions. *In re Willis*, 242 Ala. 284, 5 So.2d 716, 721. There was no evidence that Hayes and Fisher were advised of the terms of the injunction or that it applied to their conduct.

ARGUMENT

I.

The Petitioners Were Denied Due Process of Law and the Equal Protection of the Laws by the Circuit Court's Exclusion of Their Proof That the Birmingham Parade Permit Ordinance, Which the Court's Injunction Required Them to Obey, Was Discriminatorily Applied to Refuse Them Permits by Reason of Their Race and Their Advocacy of Civil Rights.

Without regard to the other issues presented here, petitioners' convictions of contempt for violating an injunction against parading without a permit must be reversed on the ground that they were denied an opportunity to offer proof in support of a federal constitutional defense to the charge. The defense offered, grounded on this Court's decision in *Yick Wo* v. *Hopkins*, 118 U.S. 356, was that petitioners were prevented from complying with the permit requirement because of discriminatory administration of the permit law. They contended that Eugene "Bull" Connor, the Birmingham Public Safety Commissioner who obtained the injunction forbidding their demonstrations without permits, also discriminatorily denied them permits to conduct demonstrations.

The essence of the contempt charge against petitioners was that they violated the Circuit Court's injunction by participating in parades or demonstrations without first having obtained permits under section 1159 of the General City Code of Birmingham.[13] The relevant portions of the injunction restrained petitioners from (a) engaging in parades "without a permit," (b) conspiring to engage in "unlawful" parades, and (c) violating the "ordinances of the City." In terms, the order restrained:

> . . . engaging in, sponsoring, inciting or encouraging mass street parades or mass processions or like demonstrations *without a permit* . . . conspiring to engage in *unlawful* street parades, *unlawful* processions, *unlawful* demonstrations . . . or from violating the *ordinances* of the City of Birmingham . . . or from doing any acts designed to consummate conspiracies to engage in said *unlawful* acts of parading, demonstrating . . . (R. 38; emphasis added).

It is plain that, as the City cast its pleadings and as both courts below viewed the issue, the permit requirement enforced by the injunction was a requirement that petitioners obtain a permit under section 1159 of the City Code; and that the only "unlawfulness" restrained or thereafter charged as contempt was a failure to obtain such a permit before participating in parades or demonstrations.

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[13] Four of the petitioners were also charged with contempt because of allegedly derogatory remarks about the Circuit Court and its injunction in a press release. This separate issue is treated in part III of the Argument below, pp. 71 to 75. As the petitioners were found guilty generally under an accusation that charged both parading without a permit and issuing of the press release, and a single penalty was imposed, the conviction must be reversed if either of the charges is constitutionally vulnerable. *Thomas* v. *Collins*, 323 U.S. 516, 529; *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 291-293. "The judgment therefore must be affirmed as to both [charges] or as to neither." *Thomas* v. *Collins*, *supra*, 323 U.S. at 529.

The injunction was not an unconditional order against marches, but an order against marching without a permit. The court in its injunctive decree left the decision whether to allow marches to the licensing officials, and thus expressly committed the legality of petitioners' conduct to the licensors' discretion.

Subsequently adjudicating petitioners in contempt, the Circuit Court stated their charged contemptous conduct to be "violation of the said injunctive order by the defendants' participating in and conducting certain alleged parades in violation of an ordinance of the City . . . which prohibits parading without a permit" (R. 420). And the Alabama Supreme Court affirmed the contempt convictions on the finding that petitioners "did engage in and incite others to engage in mass street parades and neither petitioners nor anyone else had obtained a permit to parade on the streets of Birmingham" (R. 438). There was no claim or proof that petitioners violated any of the other portions of the injunction such as those restraining trespasses, boycotts, picketing or demonstrations in churches.

In defense against the contempt charge, petitioners therefore offered to prove that they could not have obtained a permit as required by the injunction because of the discriminatory administration of the permit law.[19] They claimed that an established pattern of discriminatory denials of permits to them, and the discriminatory enforcement against them of unusual and frustrating procedural requirements in applying for permits, made their application futile and converted the injunction into a racial trap. But the Circuit Court entirely foreclosed this issue at the

[19] Petitioners averred that they "were arbitrarily unlawfully and unconstitutionally denied a permit to parade and demonstrate, and picket against racial segregation, in a peaceful manner, on the streets of the City of Birmingham, Alabama in violation of . . . the due process and equal protection clauses of the Fourteenth Amendment . . ." (R. 137).

contempt trial, holding that "the only question was did they or did they not have a permit" (R. 177).

Efforts by petitioners to establish the discriminatory administration of the permit law were consistently thwarted by rulings of the trial judge excluding their evidence. Petitioners offered testimony that when Mrs. Hendricks, a member of the A.C.M.H.R., asked City Commissioner Eugene "Bull" Connor about "getting a permit for picketing, parading, demonstrating" (R. 354), Connor immediately rejected the request, saying:

> "No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail" (R. 355).

According to this testimony, Connor rejected the request without further inquiry as soon as he was confronted with a representative of the Alabama Christian Movement For Human Rights; he did not seek information as to the time and place of the desired demonstrations, the proposed number of participants, or any other information relevant to traffic or similar considerations.[20]

The trial court granted the City's motion to exclude Mrs. Hendricks' testimony on the ground that "the statement of Mr. Connor would [not] be binding on the Commission" (R. 355). But the Court would not permit petitioners' offer of proof that the City Commission never issued parade permits and that there was an established practice (not reflected in any published laws, rules or regu-

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[20] Petitioners showed that when Rev. Shuttlesworth wired Commissioner Connor requesting a permit (R. 416), Connor promptly wired back (R. 415) asserting in the same message that he had no authority to issue permits and that Shuttlesworth could not picket: "I insist that you and your people do not start any picketing on the streets in Birmingham Alabama" (R. 415).

lations) that parade permits were issued by the City Clerk on request of the traffic bureau of the police department (R. 284-287).

It is clear that Connor, as Commissioner of Public Safety, was by statute in charge of the Birmingham police department (Code of Ala., Recompiled 1958, Title 62, §632).[21] However the trial court precluded any inquiry into the established practice in administration of the parade permit ordinance or the part played in it by the respective city agencies (R. 283-287). The court also sustained objections to all questions asked of Connor relating to his role, vis-a-vis the Commission, in issuing permits (R. 289-290).

The trial court, further, cut off inquiry about the type of parades for which permits were issued (R. 176). When petitioners' counsel stated that his purpose was to "find out . . . whether the law is being equally applied or whether it is being applied in a discriminatory manner against certain groups" (R. 177), the court said: "The Court has already passed on that question with its injunction" (R. 177).

Petitioners submit it has been clear since the Court's decision in *Yick Wo* v. *Hopkins*, 118 U.S. 356, that proof of racial discrimination in denying applications under a law requiring permits is a federal defense to a prosecution

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[21] Connor was one of three commissioners under the commission form of government in effect at that time. The distribution of powers among the three city commissioners is described in Code of Ala. Tit. 62, §632. The three departments in the city government, each headed by a commissioner, were the Department of general administration, finances and accounts, the Department of public improvements, and the Department of public safety. Section 632 provides: "Department of public safety; which shall have supervision over the fire and police departments and all things connected therewith, and over the public health and sanitation and all things pertaining thereto." In addition to the administrative powers of the individual commissioners, the commission sitting as a body had legislative powers. Code of Ala. Tit. 62, §628.

for acting without such a permit. The convictions in the *Yick Wo* case—for conducting laundry businesses in wooden buildings without permits—were reversed not only because of the potential of the permit ordinances for discriminatory administration, but because of an actual showing of racial discrimination in their enforcement. 118 U.S. at 373. Accord: *Niemotko* v. *Maryland,* 340 U.S. 268; *Fowler* v. *Rhode Island,* 345 U.S. 67. Of course this equal protection principle applies equally to street demonstrations. This Court so held in *Cox* v. *Louisiana,* 379 U.S. 536, 556-557. And, in this regard at least, there is no basis to distinguish an injunction that requires a permit from a law that requires a permit. Whatever the origin of the permit requirement, it surely violates the Equal Protection clause for a state official, administering the permit scheme, to discriminate on grounds of race or for the purpose of repressing unpopular egalitarian views, and by denying permits arbitrarily to make compliance with the permit requirement impossible. One who is thus discriminated against and arbitrarily denied a permit may not constitutionally be convicted for acting without a permit.

"[T]he First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all." *Cox* v. *Louisiana,* 379 U.S. 536, 575, 580 (Mr. Justice Black, concurring). See also the concurring opinion of Mr. Justice Clark, 379 U.S. 585, at 589. Petitioners sought to show that under Bull Connor's regime the streets of Birmingham were closed to civil rights advocates although they were open to others. *Cox* v. *Louisiana, supra;* cf. *Hague* v. *C.I.O.,* 307 U.S. 496, 516, 518. Just as in *Yick Wo,* petitioners would have established a federal constitutional defense to the charge of contempt if they had been allowed to show that the permits which they were enjoined to obtain could not be obtained

by reason of racially discriminatory administration of the permit law.

Obviously, this effort to show racial discrimination by the Birmingham authorities was not so implausible on its face that the Circuit Court could permissibly refuse to hear evidence on the issue. That petitioners had a substantial basis for their claim is clear from the testimony of Mrs. Hendricks (R. 352-355), which showed Commissioner Connor's unalterable opposition to demonstrations by civil rights advocates just as plainly as the evidence in *Lombard* v. *Louisiana*, 373 U.S. 267, showed official hostility to restaurant desegregation. Indeed, the Alabama Court of Appeals has held that section 1159 was discriminatorily applied and reversed the conviction of petitioner Shuttlesworth under that section in a case involving the same Good Friday march involved here. *Shuttlesworth* v. *City of Birmingham*, 43 Ala. App. 68, 180 So. 2d 114, 136-139 (cert. granted by Ala. Sup. Ct. Jan. 20, 1966). Judge Cates said that the "pattern of enforcement exhibits a discrimination within the rule of *Yick Wo* v. *Hopkins*, *supra*" (180 So. 2d at 139). And there is a substantial body of judicially noticeable material pointing in the same direction as the evidence of record.[22] The United States

[22] Racial segregation was enforced by law in almost every aspect of life in Birmingham. City ordinances requiring segregation in restaurants, places of entertainment and sanitation facilities appear in the Appendix, *infra*, p. 3a. Alabama, of course had many segregation laws of statewide application; forty-four sections of the code "dedicated to the maintenance of segregation" were still on the books in 1966 and are collected in an opinion by Circuit Judge Rives. *United States* v. *Alabama*, 252 F. Supp. 95, 101 (M.D. Ala.). In 1963 school segregation in Birmingham was total (*1963 Report of the U.S. Commission on Civil Rights*, p. 65); Governor George C. Wallace carried out his 1962 campaign pledge "to stand in the schoolhouse door" to prevent the admission of Negroes to the University of Alabama (*Congress and the Nation 1945-1964*, Congressional Quarterly Service, 1965, p. 1601); and despite longstanding lawsuits against voting discrimination only 11.7% of Birmingham's voting age Negroes were registered to vote in 1962. *(1963 Report of the U.S. Commission on Civil Rights, page 32.)*

Civil Rights Commission concluded in its 1963 Report that:

> The official policy in . . . Birmingham, throughout the period covered by the Commission's study, was one of suppressing street demonstrations. While police action in each arrest may not have been improper, the total pattern of official action, as indicated by the public statements of city officials, was to maintain segregation and to suppress protests. The police followed that policy and they were usually supported by local prosecutors and courts. (1963 Report of the U.S. Commission on Civil Rights, Govt. Printing Office, 1963, p. 112).

It is well settled by decisions of this Court, that denial of an opportunity to prove a federal claim is itself a denial of the federal claim. The exclusion of evidence of racial discrimination was held to be a denial of Fourteenth Amendment rights in *Carter* v. *Texas*, 177 U.S. 442, 448-449, and *Coleman* v. *Alabama*, 377 U.S. 129, 133, cases involving the systematic exclusion of Negroes from juries. Here as in *Coleman, supra*, Alabama has by exclusion of evidence denied both a hearing on the equal protection defense and the equal protection of the laws. In *Coleman, supra*, the Alabama courts while refusing to hear evidence on the claim, nevertheless decided on the merits that there was insufficient evidence to prove discrimination. Similarly in this case the Circuit Judge excluded proof of discrimination but in upholding the ordinance—as an apparent afterthought recognizing that proof of discrimination would properly offer a defense to the charge—said that there was an "absence of a showing of arbitrary and capricious action upon the part of the Commission of the City of Birmingham in denying the defendants a permit to con-

duct a parade on the streets of the City of Birmingham" (R. 422).

Plainly such a holding, rendered not merely without the slightest evidentiary support but following the exclusion of all evidence proffered by petitioners on the issue, cannot survive constitutional scrutiny. If petitioners were entitled to a hearing on the contempt charge before being convicted—as they surely were, *Re Green*, 369 U.S. 689—they were entitled to present evidence at the hearing to establish a federal constitutional defense to the charge. They were denied that opportunity to defend by the rejection of their proof that they were discriminatorily refused permits, and accordingly, they were convicted in violation both of due process and the equal protection of the laws.

Petitioners submit this case presents an ugly and extreme instance of abuse of the state judicial process to deny Negro citizens the fair and equal treatment which the Fourteenth Amendment guarantees. The record facts are plain. Birmingham city authorities who enacted the permit ordinance and controlled the right to use the city's streets under the permit power reserved by that ordinance went to a state court and obtained an *ex parte* injunctive order which subjected civil rights demonstrators who did not obtain a permit from them to the sanctions of criminal contempt. The state court issued that order, in effect committing civil rights demonstrators into the unrestricted power of Birmingham police officials and adding the judicial weapon of prior restraint to the arsenal of repressive machinery—including arrest and prosecution under the penal provisions of the permit law—by which those officials enforced monopolistic authority over political expression in the segregated city. Then the very court which had issued its process to assist the city officials and to reinforce their licensing power imposed its contempt sanc-

tions on the petitioners while refusing to hear evidence establishing that the officials who were invoking its aid were engaging in racial discrimination. Eugene "Bull" Connor thus effectively built and sprung a trap for petitioners by arbitrarily denying them permits, arresting them for marching without permits, obtaining an *ex parte* injunction against them, and having them convicted of criminal contempt at a hearing where, as at all prior stages, he was immunized from inquiry into his administration of the permit power (R. 288-291). The Circuit Court, itself used as an instrument of Connor's abusive treatment of petitioners, refused to hear evidence of that abuse. The Fourteenth Amendment will not support such a proceeding, and requires that the convictions be reversed.

II.

The Petitioners Were Unconstitutionally Convicted of Contempt For Engaging in Marches Without a Permit.

Introduction: The Unconstitutionality Of The Injunction And The Parade Permit Ordinance

At the outset it should be noted that if the Court agrees with the argument made in part I above, the convictions may be reversed on that ground alone and it would not be necessary to decide any of the questions discussed in this portion of the brief. These arguments begin with the common premise, discussed immediately below, that the injunctive order and the parade permit law, which the injunction enforced, violate the First and Fourteenth Amendments. Arguments for reversal on four distinct grounds follow. First, it is urged that a reversal must follow directly from this Court's determination that the injunction is invalid, because no adequate state ground supports the refusal of

the court below to decide the issue of validity of the injunction. Second, it is urged that there was no evidence that petitioners violated the injunction's ban on unlawful parades, because the marches were not unlawful in view of the federal constitution. Third, we argue that since the injunction appeared to permit federally protected activity, a conviction for such activity is void for want of fair notice, particularly where there was no evidence of the essential element of willfulness required to support the criminal contempt convictions. Fourth, it is urged that it is unconstitutional to punish petitioners for disobedience of this injunction which broadly and vaguely overreaches free expression of political ideas.

As was indicated above in description of the injunction's terms (*supra,* pp. 32-33), the Circuit Court's injunctive order enforces section 1159 of the Birmingham City Code. Section 1159 is unconstitutional under the doctrine, set forth in a host of this Court's decisions, that licensing laws which grant unfettered discretion to regulate free expression violate the Fourteenth Amendment. *Cox* v. *Louisiana,* 379 U.S. 536, 553-558; *Lovell* v. *Griffin,* 303 U.S. 444, 447, 451; *Hague* v. *C.I.O.,* 307 U.S. 496, 516; *Schneider* v. *State,* 308 U.S. 147, 157, 163-164; *Cantwell* v. *Connecticut,* 310 U.S. 296, 305-307; *Largent* v. *Texas,* 318 U.S. 418, 422; *Marsh* v. *Alabama,* 326 U.S. 501, 504; *Tucker* v. *Texas,* 326 U.S. 517, 519-520; *Saia* v. *New York,* 334 U.S. 558, 559-560; *Kunz* v. *New York,* 340 U.S. 290, 294; *Niemotko* v. *Maryland,* 340 U.S. 268, 271-272; *Staub* v. *Baxley,* 355 U.S. 313, 322-325; *Jones* v. *Opelika,* 316 U.S. 584, 600-603 (Stone, C.J. Dissenting), 611, 615 (Murphy, J. Dissenting), dissenting opinions adopted per curiam on rehearing, 319 U.S. 103; Cf. *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 90; *Freedman* v. *Maryland,* 380 U.S. 51, 56.

That the ordinance in this case grants an impermissibly broad discretion is hardly debatable. In a colloquy during the trial below the judge remarked with some understatement that "the ordinance itself . . . allows certain discretion in the City Commission" (R. 284). Section 1159 in terms requires that a permit application set forth, *inter alia*, the "purpse for which [a parade, procession or other public demonstration] . . . is to be held or had" and directs the licensing authorities to grant a written permit unless in their "judgment the public *welfare, peace, safety, health, decency, good order, morals* or *convenience* require that it be refused." (emphasis added.)

The ordinance thus allows broad power to suppress unpopular demonstrations in advance if the licensing authorities believe that it is generally desirable that they be suppressed. The ordinance contains neither an absolute prohibition on all such demonstrations, nor a general authorization for demonstrations subject only to normal traffic controls. There are no provisions in the ordinance that confine the licensing officials to narrow and proper criteria relating to the duration, time and place of demonstrations or to the regulation of traffic in public places; and there is nothing in the decisions below which places a confining gloss on the ordinance through construction. By committing to the licensing officials the authority to decide, in view of the purpose of a demonstration, whether the "public welfare," etc. will be served by the demonstration, this ordinance empowers the Commissioners to outlaw any protest activity they disapprove. The discretion granted by section 1159 is similar to that conferred by the law invalidated in *Staub* v. *Baxley*, 355 U.S. 313, 314 n.1, which directed the licensing body to consider "the character of the applicant, the nature of the business of the organization . . ., and *its effects upon the general welfare* of citizens of the

City of Baxley." (Emphasis added.) Of course, in Birmingham, the Commissioners may consider, in addition to "the public welfare," dictates of decency, good order, morals, etc.—a congeries of concerns which comes close to exhausting the capacity of human sensitivity to fear for the undisturbed tranquility of Birmingham life.

Section 1159 is unconstitutional on its face under this Court's decision in *Cox* v. *Louisiana*, 379 U.S. 536, 553-558, and cases cited. *Cox* invalidated convictions based upon a Louisiana law proscribing "Obstructing Public Passages" because, as the law was enforced in the discretion of city officials, the situation was "the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials" (379 U.S. at 557). The decision thus applied to the licensing of street demonstrations the stringent standards of the Court's prior decisions condemning various other types of speech-licensing laws for over-broad discretion:

> A long line of cases in this Court makes it clear that a State or municipality cannot "require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be . . . disseminate[d] . . ." *Schneider* v. *State*, [308 U.S. 147, 164.] See *Lovell* v. *Griffin*, [303 U.S. 444]; *Hague* v. *C.I.O.*, [307 U.S. 496]; *Largent* v. *Texas*, [318 U.S. 418]; *Saia* v. *New York*, [334 U.S. 558]; *Niemotko* v. *Maryland*, [340 U.S. 268]; *Kunz* v. *New York*, [340 U.S. 290].
>
> This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the

> suppression of the communication of ideas and permits the official to act as a censor. See *Saia* v. *New York*, *supra*, at 562. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws. See *Niemotko* v. *Maryland*, *supra*, at 272, 284; cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary licensing power . . . (379 U.S. at 557).

The Fourteenth Amendment requires that there be "narrowly drawn, reasonable and definite standards for the officials to follow." *Niemotko* v. *Maryland*, *supra*, 340 U.S. at 271.

The Circuit Court below relied upon *Cox* v. *New Hampshire*, 312 U.S. 569, to sustain section 1159 (R. 422). The reliance is visibly ill-founded, for the New Hampshire statute involved in *Cox*—like the parallel provision involved in *Poulos* v. *New Hampshire*, 345 U.S. 395—was construed by the state courts to limit the licensing officials' authority to "considerations of time, place and manner" in order to "prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder" (312 U.S. at 575-576). In *Cox* v. *New Hampshire*, there were no "licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Kunz* v. *New York*, 340 U.S. 290, 293-294. We need not labor the obvious dis-

tinction which this Court has many times drawn. Significantly, the Alabama Supreme Court did not follow the Circuit Court in thinking that *Cox* v. *New Hampshire* sustained Birmingham Code section 1159, but affirmed petitioners' convictions on grounds (shortly to be discussed) which avoided passing on the constitutional validity of this palpably invalid ordinance.

The censor's discretion allowed by the vague and overbroad permit standards of section 1159 is the most obvious but not the only vice of that section. The provision makes it a crime to hold, organize or participate in an unpermitted "parade or procession or other public demonstration on the streets or other public ways of the city." This definition of proscribed activity, of the sort of activity for which a permit must be obtained, is itself too indefinite to meet the "strict" "standards of permissible statutory vagueness . . . in the area of free expression." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432. Like the prohibition of loitering and picketing condemned in *Thornhill* v. *Alabama*, 310 U.S. 88, a penal prohibition of parades, processions or other public demonstrations overreaches "nearly every practicable, effective means" of publicizing the grievances of deprived and unpopular groups. Cf. 310 U.S. at 104. "The vague contours of the term [public demonstration] . . . are nowhere delineated." Cf. *id.* at 100-101. See also *Carlson* v. *California*, 310 U.S. 106, 111-112.

The application of the ordinance to activities on the sidewalks is ambiguous, and the failure to specify the number of persons or their characteristics which convert pedestrians into a "parade" or "procession" makes even the narrowest proscriptions of section 1159 unconstitutionally indefinite. The extent of this indefiniteness is made apparent by the Alabama Court of Appeals' reversal of the criminal conviction of Rev. Shuttlesworth for violating sec-

tion 1159 by participating in the same Good Friday walk that is involved in this case. That court held that evidence the Good Friday group walked on the sidewalks, obeying traffic regulations and not going on the roadway failed "to show a procession which would require, under the terms of section 1159, the getting of a permit." *Shuttlesworth* v. *City of Birmingham*, 43 Ala. App. 68, 180 So.2d 114, 139 (cert. granted by Ala. Sup. Ct. Jan. 20, 1966).

Indeed, in that case section 1159 was held unconstitutional by the Alabama Court of Appeals on all the grounds urged by petitioners here. *Shuttlesworth* v. *City of Birmingham*, 43 Ala. App. 68, 180 So.2d 114. Judge Cates invalidated the convictions of the Good Friday marchers on numerous grounds, ruling that section 1159 imposed an invidious prior restraint on free use of the streets; that the law lacked ascertainable standards for granting or withholding permits; that the law was discriminatorily applied contrary to *Yick Wo* v. *Hopkins*, 118 U.S. 356; and that there was insufficient evidence that the Good Friday walk on the sidewalks violated section 1159.

The injunctive order upon which these petitioners' contempt convictions are based carries with it all of the ambiguity and overbreadth of section 1159 because in terms it orders obedience to that ordinance. It is additionally vague insofar as it enjoins "conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations . . . or other like unlawful conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama . . ." (R.38). The injunction thus incorporates by reference the whole body of city, state and federal law which might govern a parade. The benchmark for testing conduct permitted by the injunction is essentially the constitutional boundary itself. But an injunction making the constitutional limit of state authority

the line of criminality gives "no warning as to what may fairly be deemed to be within its compass" *Garner* v. *Louisiana*, 368 U.S. 157, 185, 207 (Mr. Justice Harlan, concurring); see Note, 109 U.Pa.L.Rev. 67, 76 (1960). Such a vague and general command not to act unlawfully, is readily susceptible of discriminatory enforcement, cf. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433; *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98, and by its broad and repressive effect coerces the citizen to surrender his rights to engage in protected protests through fear of punishment for contempt. *Dombrowski* v. *Pfister*, 380 U.S. 479, 494; *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98; *Smith* v. *California*, 361 U.S. 147, 150-151; cf. *Wood* v. *Georgia*, 370 U.S. 375, 391.

Indeed the broad command not to act "unlawfully" in parades or demonstrations presents basically the same question involved in prosecution of demonstrators under generalized charges of breach of the peace, condemned in *Cantwell* v. *Connecticut*, 310 U.S. 296; *Edwards* v. *South Carolina*, 372 U.S. 229; *Fields* v. *South Carolina*, 375 U.S. 44; *Henry* v. *Rock Hill*, 376 U.S. 776; and *Cox* v. *Louisiana*, 379 U.S. 536, 544-552; cf. *Terminiello* v. *Chicago*, 337 U.S. 1; *Ashton* v. *Kentucky*, 384 U.S. 195. That this vague prohibition comes from a court order, rather than from the legislature, does not improve its constitutional credentials. *Thomas* v. *Collins*, 323 U.S. 516; *Cafeteria Employees' Union* v. *Angelos*, 320 U.S. 293; *Chauffeurs Union* v. *Newell*, 356 U.S. 341. Rather, it aggravates the vice of vagueness by embodying the vague prohibition of the penal law in the sort of prior restraint which, since *Near* v. *Minnesota*, 283 U.S. 697, "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. See part II(D) below.

Section 1159 and the injunction enforcing it are, therefore, unconstitutional and obviously so. Had petitioners been charged criminally with violation of the ordinance, its unconstitutionality would have been available as a defense. In considering such discretionary licensing laws, this Court has "uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance." *Staub* v. *Baxley*, 355 U.S. 313, 319. "As the ordinance is void on its face, it was not necessary . . . to seek a permit under it." *Lovell* v. *Griffin*, 303 U.S. 444, 452; see *Thornhill* v. *Alabama*, 310 U.S. 88, 97; *Freedman* v. *Maryland*, 380 U.S. 51, 56. Nor has it been thought a precondition of review that facially unconstitutional licensing laws be challenged in court before they are challenged by violation. As the court said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 306, "the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible." The question here presented is whether the City of Birmingham, by increasing the efficacy of its prior restraint through the device an *ex parte* injunctive order that compelled obedience to the void ordinance, was successful thereby in depriving petitioners of their otherwise available constitutional defense. We submit that it was not, and that the unconstitutionality of section 1159 and the injunction compel reversal of petitioners' contempt convictions, for each of the following reasons.

A. The unconstitutionality of section 1159 and the injunction enforcing it may properly be considered by this Court on review of petitioners' contempt convictions because the refusal of the Alabama Supreme Court to entertain this federal defense is not an adequate and independent state ground of decision.

In reviewing state contempt convictions, this Court has consistently held that where state procedure permits an individual to test an injunction on the merits by engaging in the enjoined conduct and defending against a consequent contempt citation on the ground that the injunction is unlawful, any federal challenge to the lawfulness of the injunction may be determined by this Court. Thus in *Thomas* v. *Collins,* 323 U.S. 516, where the Texas Supreme Court, reviewing a contempt conviction for violation of an injunctive order, ruled on the federal constitutional objections to the order and to a statute on which it was based, this Court entertained an appeal on the federal questions, 323 U.S. at 524, n. 7, and reversed Thomas' conviction. Similarly, the court decided the federal issues underlying a contempt commitment in *Ex Parte George,* 371 U.S. 72, 73, noting that under Texas law "one may not be punished for contempt for violating a temporary injunction . . . granted by a court having no jurisdiction of the subject matter." See also *Donovan* v. *Dallas,* 377 U.S. 408. Thus, plainly, if federal challenges to injunctive process are appropriately presented for decision under state practice in the state proceedings to punish for contempt for violation of the process, they may be reviewed in this Court.

Prior to the decision below in the present case, Alabama decisions permitted a variety of defenses based on the invalidity of an injunction to be raised in defense of a contempt charge for its violation. Never before this case had the Alabama courts stated the rule announced in the opin-

ion below, that in reviewing contempt convictions for violation of an injunctive order, the only inquiry which was to be made was whether the court issuing the injunction had jurisdiction of the parties and was a court with equitable power to issue injunctions (R. 439).

To the contrary, in *Board of Revenue of Covington County* v. *Merrill*, 193 Ala. 521, 68 So. 971 the Alabama Supreme Court reversed a conviction for disobedience of an injunction on the ground that the court issuing the injunction had no jurisdiction over the subject matter, in view of the insufficient allegations in the complaint before it. The details of the case are illuminating. The suit was brought by a resident and taxpayer to enjoin the Board of Revenue from constructing a courthouse. While a temporary injunction was in effect, the Board of Revenue violated the order by entering into a construction contract. The Board was held in contempt, but the Supreme Court of Alabama reviewed the contempt judgment on certiorari and reversed. The State Supreme Court held that the chancery court could not enjoin the Board of Revenue from exercising its discretion to build a courthouse unless the bill of complaint contained "specific averments of facts that amounted to fraud, corruption, or unfair dealing and collusion on the part of the board of revenue," and that "without such specific allegations, the chancery court was without jurisdiction" (68 So. at 979). Accordingly, the punishment for violation of the injunction was set aside. The court stated that the statutes providing punishment for contempt:

> "... give the right of punishment when the party is 'in contempt' of a court having jurisdiction. A construction that would give a power of punishment in a case where jurisdiction had not attached would not be due process" (68 So. 978).

Then the court went on to make clear that its doctrine referred to jurisdiction over the subject matter of the suit and quoted with approval (68 So. at 978-979) the following language from an opinion in *Old Dominion Telegraph Co.* v. *Powers,* 140 Ala. 220, 37 So. 195, 197, 1 Ann. Cas. 119:

> "Where the court is without jurisdiction, it logically follows that there can be no contempt in the disobedience of a void order. The proposition that, where the injunction is void for want of jurisdiction in the court, the defendant cannot be punished by contempt proceedings for disregarding it, is supported both on reason and authority."

The doctrines of the *Old Dominion* opinion and of *Board of Revenue* v. *Merrill* were restated and reaffirmed in *Ex Parte Connor,* 240 Ala. 327, 198 So. 850, 853-854. In *Connor,* the court refused a writ of prohibition to halt a contempt prosecution, but stated that a claim that an injunction was "vague, indefinite and so uncertain as that the respondents could not understand the same," if true, "might constitute a defense to a contempt proceeding, but would not constitute a reason for granting the writ of prohibition" (198 So. at 853).[22]

More recently the Alabama Supreme Court described the scope of its review of contempt judgments in *Fields* v. *City of Fairfield,* 273 Ala. 588, 143 So.2d 177, reversed 375 U.S. 248. In *Fields,* the court quoted with approval language from a civil contempt case, *Ex parte National Ass'n for Adv. of Colored People,* 265 Ala. 349, 91 So.2d 214, reversed 357 U.S. 449, where the court had said:

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[22] In connected litigation, the contempt convictions of Connor's co-defendants were reversed on the ground that their conduct was not a willful contempt but rather a good faith misconstruction of the injunction. In re *Willis,* 242 Ala. 284, 5 So.2d 716.

> "It is only *where the court lacked jurisdiction of the proceeding,* or *where on the face of it the order disobeyed was void,* or where procedural requirements with respect to citation for contempt and the like were not observed, or where the act of contempt is not sustained, that the order or judgment will be quashed." (Emphasis added.)

The court in *Fields,* 143 So.2d at 179, concluded that "on its face, the order disobeyed was not void." This conclusion was in turn based upon an express holding, rejecting the defendant's federal constitutional argument that the ordinance upon which the injunction was based was invalid. The Alabama Supreme Court ruled on the federal objection to the ordinance on the merits saying: "We cannot say that it is unconstitutional on its face." (143 So.2d at 179).

We hasten to point out that the *Fields* v. *City of Fairfield* opinion also contains language to the effect that a person charged with contempt for violating an injunction enforcing an invalid law "may not raise the question of its unconstitutionality in collateral proceedings on appeal from" a contempt conviction, citing *United States* v. *United Mine Workers,* 330 U.S. 258; *Howat* v. *Kansas,* 258 U.S. 181, and several New York cases (143 So.2d at 180). However, notwithstanding this language, the Alabama Supreme Court did explicitly rule on the constitutionality of the ordinance in *Fields* as we have pointed out above. Although its opinion is ambiguous on this score, its decision sustaining the ordinance and injunction on the merits while invoking the *Mine Workers* principle may most plausibly be explained as a holding that constitutional challenges to the "face" of an injunction or underlying legislative authority for an injunction may be raised in the contempt proceedings, although other constitutional challenges may not.

However, this may be, it is clear that, until the instant case was decided in December, 1965, the Alabama Supreme Court, reviewing contempt cases, engaged in some inquiry beyond the questions whether there was jurisdiction over the parties and a court with equity powers. The exact scope of that inquiry was unclear, in part because of the use of the "jurisdictional" fiction in *Board of Revenue* v. *Merrill,* 193 Ala. 521, 68 So. 971. But consistent with prior Alabama doctrine the Alabama Supreme Court could in the present case have reviewed the validity of the injunction and the underlying ordinance to determine whether the injunction was beyond the power of the Court (*Board of Revenue of Covington County* v. *Merrill, supra*) or whether the injunction, or underlying ordinance, was unconstitutional on its face (*Fields* v. *City of Fairfield,* 273 Ala. 588, 143 So.2d 177, 179). Thus, the decision below refusing to hear petitioners' constitutional challenges to the power of the Circuit Court and the face of its injunctive order does not rest upon a non-federal ground adequate to bar review of the merits here on *certiorari.*

This Court has found several distinct categories of assertedly independent non-federal grounds of decision inadequate to preclude its review. Where state courts exercise discretion to consider the federal claim in a given procedural mode, this Court may hear a federal contention notwithstanding the state court's refusal to do so. *Williams* v. *Georgia,* 349 U.S. 375, 389 (discretion to consider motion); *Shuttlesworth* v. *Birmingham,* 376 U.S. 339 (discretion to consider petition filed on wrong-sized paper). Similarly, if a state has traditionally recognized a defensive procedure, the state may not suddenly change its procedure, closing off an apparent channel for raising a federal defense to the surprise and prejudice of particular defendants. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 457-458; *Barr* v. *City*

of Columbia, 378 U.S. [illegible], 149-150. Equally clearly, state rules, which unfairly confuse a litigant with respect to the appropriate procedures, may not bar federal review, although they "may now appear in retrospect to form part of a consistent pattern" if litigants "could not fairly be deemed to have been apprized of [their] existence" *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 457. See *Staub* v. *Baxley,* 355 U.S. 313, 320; *Wright* v. *Georgia,* 373 U.S. 284, 290-291.

Here, the manipulatability of concepts such as "jurisdictional" contentions and contentions attacking the "face" of injunctive process give the Alabama courts the practical equivalent of discretion to hear or refuse to hear federal claims like the petitioners'. That same manipulatability makes Alabama procedure in this regard unfairly obscure, and an inadequate vehicle for presentation of federal claims to the Alabama courts. Perhaps the present Alabama Supreme Court opinion lays the issue at rest. Perhaps not. But prior to this opinion Alabama law either allowed the mode of federal challenge employed by these petitioners (and, indeed, recognized by the Circuit Court in their case), or else must fairly be characterized as a muddle concealing snares. It is notable that the Alabama Supreme Court cites no Alabama cases to support its decision refusing to rule on the constitutionality of the injunction. Indeed, it does not even cite its recent decision in *Fields* v. *Fairfield, supra,* a circumstance strongly supporting the petitioners' view of the inconsistency between that and the present decision. Nor has the Alabama Supreme Court ever expressly repudiated or over-ruled its decision in *Board of Revenue of Covington County* v. *Merrill,* 193 Ala. 521, 68 So. 971.[24]

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[24] *Board of Revenue, etc.* v. *Merrill, supra,* was cited with approval in *McCollum* v. *Birmingham Post Co.,* 259 Ala. 88, 65 So.2d 689, 696 (1953) on rehearing; *Ex parte White,* 245 Ala. 212, 16 So.2d 509 (1944); and *Ex parte Wheeler,* 231 Ala. 356, 165 So. 74 (1936).

Petitioners were therefore fairly entitled to believe on the basis of the Alabama precedents, that they might litigate the validity of the injunction in the contempt proceedings. Their claim that the injunction infringed First Amendment freedoms, and invaded an area entirely outside the competence of the Circuit Court, was a "jurisdictional" defense in the sense in which *Merrill* used the term. Their attack presented a challenge to the injunction "on its face" in the sense in which such an attack was made and entertained in *Fields* v. *Fairfield*. For these reasons, petitioners' federal objections to the injunctive order as a plain First Amendment violation are properly brought here. As this Court has repeated on several occasions, "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 457-458; *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 301.

B. The convictions denied petitioners due process of law because there was no evidence that petitioners participated in a forbidden "unlawful" parade or demonstration.

A conviction based on no evidence of guilt denies due process of law in violation of the Fourteenth Amendment. *Thompson* v. *Louisville*, 362 U.S. 199; *Fields* v. *City of Fairfield*, 375 U.S. 248. See also *Garner* v. *Louisiana*, 368 U.S. 157; *Taylor* v. *Louisiana*, 370 U.S. 154; *Barr* v. *City of Columbia*, 378 U.S. 146; *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 93-95. The inquiry in contempt cases (*Fields* v. *City of Fairfield, supra*), as in others, is to ascertain whether there is *any* evidence of the elements of criminality.

In this case the essence of the restraint put on petitioners was that they not engage unlawfully in parades, processions or demonstrations without a permit. Thus if the petitioners' conduct was not unlawful because it was federally

protected it was not in violation of the injunction. There is confirmation of the fact that the injunction was intended to incorporate the federal constitutional standard from a variety of sources.

The injunction, which in terms prohibits "mass street parades or mass processions or like demonstrations without a permit" also uses the word "unlawful" repeatedly, restraining *inter alia*:

> ". . . conspiring to engage in *unlawful* street parades, *unlawful* processions, *unlawful* demonstrations, *unlawful* boycotts, *unlawful* trespasses, and *unlawful* picketing or other like *unlawful* conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama . . ." (emphasis added) (R.38).

And, as we have demonstrated in point I above, this injunctive order plainly conceived parading "without a permit" and parading "unlawfully" as synonymous and interchangeable phrases: the only unlawfulness contemplated was parading without a permit, and parading without a permit issued under a statute valid within the Constitution.

This reading of the order is confirmed by the fact that the circuit judge deemed it necessary to uphold the validity of the parade ordinance (citing *Cox* v. *New Hampshire*, 312 U.S. 569) to support his determination of guilt (R. 422). He took this position in the context of his explicit understanding that petitioners' defense was that "the acts for which they are cited are not unlawful acts and that they do not refuse to obey the lawful order of this Court, but that the acts which they have performed were those protected by the First and Fourteenth Amendments . . ." (R. 421). Confronted with this contention, the Circuit Court never stated or implied that its order was intended to forbid any lawful acts or that it would not recognize a

defense based on the Constitution. It ruled the acts unlawful by sustaining the parade ordinance.

The Alabama Supreme Court, apprised of petitioners' no-evidence defense (R. 22), also did not hold that the injunction covered conduct which was "lawful" in the federal constitutional sense. It reached its result, not by finding the conduct unlawful, nor by construing the injunction so as to preclude a defense that the conduct was federally lawful, but rather by misconstruing petitioners' brief to find a concession that they had violated the injunction (R. 437-438). The brief (quoted in the opinion below, R. 438), said only that after "issuance of the injunctive order, petitioners and others continued their participation in these protest demonstrations" (R. 438). There was of course no admission of participation in prohibited "unlawful" demonstrations. To the contrary, the brief argued at length that petitioners' conduct was constitutionally protected and that there was no evidence under the doctrine of *Thompson* v. *Louisville,* 362 U.S. 199, to sustain a finding of guilt of "unlawful" conduct.

If, as we have argued above, pp. 41 to 48, section 1159 was unconstitutional on its face, it could be ignored with impunity. *Lovell* v. *Griffin,* 303 U.S. 444; *Staub* v. *Baxley,* 355 U.S. 313. Petitioners' conduct ignoring the void permit ordinance was accordingly not "unlawful" in violation of the injunction's terms. The finding below that petitioners violated the injunction, which restrained them from *unlawfully* parading without a permit, is therefore wholly unsupported by the evidence since that evidence showed only that they demonstrated without a permit in violation of an unlawful ordinance.

C. Since the injunction appears to forbid only that which is "unlawful" a construction which permits convictions under the injunction for engaging in federally protected activity would be void for want of fair notice and also for want of any evidence of contumelious intent, in violation of due process of law.

Even if it is assumed, contrary to the argument in Part B above, that the courts below *sub silentio* construed the injunction, as a matter of state law, to restrain conduct which is federally protected, the convictions of these petitioners must be reversed. The injunctive order itself is replete with references to "unlawful" conduct as that which it forbids. Any later-day construction of the order which permitted punishment for its violation by federally protected, hence lawful, demonstrations without a permit, would fail to give fair warning as to the conduct prohibited. Thus to interpret the injunction as if the word "unlawful" did not qualify its reach would unforeseeably broaden the scope of the order so as to punish actions which were not prohibited when they were done. *Bouie* v. *City of Columbia,* 378 U.S. 347, is analogous. There a state law was given an unexpected construction which broadened the scope of an apparently narrow prohibition. This court held that such an expansive construction of the law could not be given retroactive effect.

Petitioners' convictions have no evidentiary basis in any event because there was not, and could not have been, any evidence that they knowingly and willfully violated the apparent command of the order not to demonstrate unlawfully. There was, in short, no evidence of contumelious intent. Petitioners had every right to rely upon the order's apparent prohibition only of unlawful demonstrations, and also upon the many plainly applicable decisions of this Court holding similar permit laws unconstitutional. The defendant in *James* v. *United States,* 366 U.S. 213, in a

far less graceful posture than these petitioners, was said not to have "willfully" violated the tax laws when he acted in reliance upon a prior decision holding his illegally gotten income not taxable. (366 U.S. at 221-222; opinion of the Chief Justice, in which Justices Brennan and Stewart concurred). This view in *James,* recognizes as it must, the absurdity of characterizing as willfully unlawful any conduct coming squarely within the protection of a controlling decision of the Supreme Court of the United States. No trier of fact could be permitted to find such conduct willfully unlawful. So in the present case there was and could be no evidence in the due-process sense of a specific intent to do an unlawful act when there was well-founded cause to believe that petitioners' acts were protected by the First and Fourteenth Amendments.

D. On this record, petitioners may not constitutionally be punished for violation of an injunctive restraint forbidden by the First Amendment and whose vagueness casts a broadly repressive pall over protected freedoms of expression.

If it is assumed *arguendo,* contrary to arguments II(A), (B) and (C) above, that petitioners did willfully violate the injunction after adequate notice, and that regular and consistently applied Alabama procedure forbids testing the validity of an injunction in a contempt prosecution for engaging in the enjoined conduct, the question is presented whether that Alabama procedure may constitutionally be enforced to punish petitioners by the sanctions of criminal contempt for failure to obey the dictates of a federally unconstitutional injunction. This question requires consideration of the doctrine ordinarily associated with *United States* v. *United Mine Workers,* 330 U.S. 258, and of its implications in the area of First Amendment freedoms. Petitioners contend that the so-called *Mine*

Workers doctrine, compelling obedience in some circumstances to temporary injunctive process even though that process be unconstitutionally issued, has no application to injunctions which restrain the exercise of First Amendment rights. While petitioners would take this position in any First Amendment case, they urge that at the least *Mine Workers* be recognized as inapposite on the present record, involving a vague and overbroad, patently unconstitutional state injunction, issued *ex parte*, commanding subjection of First Amendment freedoms to the unfettered discretion of administrative censors, and effecting the wholesale repression of speech in a volatile political situation, during the only time when speech could be effective as an instrument of social action.

At the outset of this submission, it should be noted that the actual result in the *Mine Workers* case did not depend on the view that void judicial orders must be obeyed, even in the limited circumstances there presented. A majority of the *Mine Workers* court explicitly held the injunction in that case valid.[25] Nevertheless, because five Justices subscribed to the view that even void orders were enforceable by contempt (although only two of the five thought the *Mine Workers* order was void) the *Mine Workers* case has generally been understood as authority for that view. So the court below considered it, even in the very different factual context of this litigation.

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[25] The contempt judgment in *United States* v. *United Mine Workers*, 330 U.S. 258, was affirmed by a 7-2 vote. The opinion of Chief Justice Vinson (joined by Justices Reed and Burton) held the injunction valid and stated as an alternative ground that disobedience of non-frivolous invalid orders could be punished. Justices Jackson and Frankfurter concurred holding the contempt punishable notwithstanding the invalidity of the order. Justices Black and Douglas concurred solely on the ground that the injunction was valid, without deciding whether a violation of a void order might be punished. Justices Murphy and Rutledge dissented on the ground that the order was invalid and that invalid orders might not be enforced by contempt punishment.

We urge, to the contrary, that the doctrine announced in *Mine Workers* should not be applied in the area of First Amendment freedoms. The *Mine Workers* case and the principal precedents for *Mine Workers*—*United States* v. *Shipp*, 203 U.S. 563 and *Howat* v. *Kansas*, 258 U.S. 181—involved no claims that injunctive orders infringed free speech rights. No precedent of this Court or reasoning that should receive acceptance by it supports the extension of these cases into the realm of constitutionally free expression, where they would collide violently with other long-recognized principles upon which the highest and most vital aspirations of our open society daily depend.

The danger of permitting enforcement of any unconstitutional governmental order that infringes First Amendment rights is immediately evident. A power to enforce unconstitutional law in any hands is a power to govern unconstitutionally. No elaborate analysis is required to demonstrate that First Amendment freedoms and the values they express may alike be destroyed if recognizedly invalid orders infringing those freedoms are enforced by criminal penalties. It should not be forgotten that the only occasion for the application of the *Mine Workers* doctrine is the determination that a judicial order *has* been invalidly issued, and the effect of the doctrine is precisely to legitimate its enforcement by criminal or other sanctions notwithstanding its invalidity.

Of course, one may take the view that the unconstitutional restraints thus countenanced by the *Mine Workers* doctrine are only slight and temporary freezes and, even where most sensitive and cherished rights are restrained, that the restraint is a necessary incident of the inevitably time-consuming procedures required for reliable judicial determination of the question whether, in fact, the rights assertedly affected by a restraint are rights at all. But

this conception, even if factually sound in some circumstances (as we shall later show it is not on the present record), is the fit beginning, not the end, of constitutional analysis under the First Amendment.

This Court has frequently manifested its concern with the effect on First Amendment rights of the procedures by which claims of those rights are adjudicated, and it has not hesitated to condemn procedures that involve undue dangers, menaces or delays to the vindication of the rights. For example, the Court has rejected an unfair allocation of the burden of proof respecting First Amendment issues, *Speiser* v. *Randall,* 357 U.S. 513; has invalidated a law eliminating the element of scienter where free expression was involved, *Smith* v. *California,* 361 U.S. 147; and has imposed stricter standards of permissible statutory vagueness in reviewing laws touching on the First Amendment area, *Thornhill* v. *Alabama,* 310 U.S. 88; *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433. The Court has expressed grave concern about the timing of state procedures regulating free expression and has required that censorial restraints imposed prior to a judicial determination be of brief duration and that administrative licensing procedures assure prompt judicial review. *Freedman* v. *Maryland,* 380 U.S. 51; cf. *Marcus* v. *Search Warrant,* 367 U.S. 717, 737. Recognizing the gravity of the broad threat posed by vague laws susceptible of sweeping and improper application abridging First and Fourteenth Amendment guarantees, the Court in *Dombrowski* v. *Pfister,* 380 U.S. 479, found it appropriate to cut short the normal process of adjudicating constitutional defenses in a criminal prosecution. *Dombrowski* required cessation of prosecutions under indictments charging violation of a vague law that overreached free expression until the state undertook the burden of non-criminal litigation to obtain a narrowing construction of its statute, whose enforcement would not

thereafter be attended by serious incidental restraints on constitutionally protected speech.

Decisions such as *Dombrowski* v. *Pfister* and *Freedman* v. *Maryland,* demonstrate that even some compelling state interests must be subordinated, and some efficient—arguably, necessary—state procedures must be overriden to assure adequate protection of free expression. *Re Green,* 369 U.S. 689, shows a similar subordination of a state's interest in enforcing compliance with its courts' temporary injunctive orders in the face of a superior federal interest in restricting state power to issue such orders. This Court there reversed the contempt conviction of a lawyer who advised his clients to disobey a state injunction on the ground that he had been denied an opportunity to present evidence showing the injunction invalid by reason of federal N.L.R.B. preemption. *Re Green,* thus involved a contest between the state court's legitimate concern with commanding obedience to its preliminary restraining orders and the national labor policy which, as it might appear after hearing, could forbid any state restraint in the controversy. The Court resolved the conflict in a manner dictated by the overriding national policy, following its earlier decision in *Amalgamated Asso. S.E.R.M.C.E.* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, that "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption" (369 U.S. at 692).

However vital and important the national labor policy may be, it surely can have no greater force than the constitutional right to free expression. Time and again this court has made clear that free speech and expression, especially political speech, is constitutionally in a "preferred position," *Marsh* v. *Alabama,* 326 U.S. 501, 509;

Saia v. *New York,* 334 U.S. 558, 562, and that such freedoms are "delicate and vulnerable, as well as supremely precious in our society," *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433. We submit that if these pronouncements accurately reflect the ordering of national values of a free society under the Constitution, the result reached in *Re Green* is compelled *a fortiori* in a case where state contempt or criminal sanctions are invoked to enforce the order of a state court prohibited by the First Amendment.

Two additional considerations support this result. First, whatever vicissitudes it has suffered at the fringes, the doctrine of prior restraint has continued in its essential parts to command the recognition of this Court, see *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70, and for sufficient reasons. See Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. Prob. 648 (1955). The essence of this doctrine, as developed from *Near* v. *Minnesota,* 283 U.S. 697, through *Freedman* v. *Maryland, supra,* is to preserve the right of the individual—except where the most imperative considerations of the social order ineluctably oppose—to communicate his ideas first and suffer the consequences later. Thus the value of speech as its own preservator is maximized, and whatever convincement, maturity or change speech may work within the social and political worlds itself affects the vital judgment how the speaker is to be treated by his society. Necessarily, this conception comports the notion that the lawfulness of speech is ordinarily to be litigated after the speaker has had his say; only then is it to be determined whether his expression has offended some public law, and whether, even though it has, the free-speech guarantees of the Constitution protect him. Not one, but both of these issues are to be decided after what he says has been heard and has had its effect. But this is precisely what the application of the *Mine Workers* rule in the area of free expression precludes.

The present case is exemplary. A sweeping and censorial licensing law—such as Birmingham Code Section 1159—is always an intolerable prior restraint. *Cantwell* v. *Connecticut, supra.* But the evil is infinitely compounded if enforcement of such a law by an injunction is given the effect of coercing obedience in derogation of the normally applicable rule that this sort of law may be contested in a criminal prosecution for its violation notwithstanding failure to seek a permit. *Lovell* v. *Griffin,* 303 U.S. 444, 452-453; *Staub* v. *Baxley,* 355 U.S. 313, 319. Once the injunction issues, a person enjoined may no longer speak, run his calculated risk, and enjoy subsequent successful vindication of his rights, even in a clear case of protection on the one hand and willfull repression on the other. By fiat of any judicial officer, that restraint of speech which the Constitution forbids is for some indefinite time allowed, and the constitutional boundaries of free expression are fixed in the narrow compass of the views held by the enjoining judge—in good faith or bad, and with or without legal and factual enlightenment—at the time before the speaker has been heard. No subtlety of formulation can conceal that the effect of such a rule is to give judges the most extreme and repressive powers over speech in the very circumstances when their powers are least likely to be exercised from an informed and enlightened perspective.

Second, it can hardly be argued that the concern, however important, of preserving respect for the courts and the rule of law through orderly appeal of erroneous judicial decisions justifies a result so fraught with peril for free expression. These concerns, though equally weighty in other contexts, were not there deemed dispositive: for example, in *Johnson* v. *Virginia,* 373 U.S. 61; and *George* v. *Clemmons,* 373 U.S. 241, where the defendants were sustained in disobeying judicial orders enforcing racial segre-

gation among spectators in the courtroom; and in *Hamilton* v. *Alabama,* 376 U.S. 650, where a witness testifying in her own behalf was sustained in refusing to obey the court's direction that she answer questions when addressed by the prosecutor in a racially discriminatory fashion. The plain fact is that most persons, confronted by a judicial order, will be sufficiently compelled to obey it by the chance that the judge is right, coupled with the threatened consequences if he is right; the increment in obedience obtained by assuring the power to punish even when the judge is wrong hardly measures significantly against the cost in the First Amendment area of enforcing unconstitutional restraints. Again, this Court,—and, indeed, the Alabama Supreme Court—has long recognized that a witness claiming the privilege against self-incrimination, may disobey a judicial order to answer questions and litigate the validity of the claim when prosecuted for contempt. E.g., *Blau* v. *United States,* 340 U.S. 159; *Stevens* v. *Marks,* 383 U.S. 234; *Ex parte Boscowitz,* 84 Ala. 463, 4 So. 279 (1888); *Ex parte Blakey,* 240 Ala. 517, 199 So. 857 (1941). The present case is different from those just mentioned only in that here the court order involved is labeled "injunction." But it is difficult to perceive that the label significantly affects the realities of judicial prestige on the one hand or destruction of individual rights through unconstitutional judicial action on the other. The self-incrimination cases show plainly that disobedience of judicial orders may be accepted and institutionalized as a means of challenging them, without disruptive effects on judicial dignity or power. And just as the privilege against self-incrimination would irrevocably be lost if a valid claim of privilege could not be maintained even in the face of an erroneous judicial order, so it is with free expression. The power to suppress expression by injunctive order is inevitably in many cases—and perhaps in most cases of political expres-

sion—the power to deny an airing of ideas at the only time when they may be effective. That is, simply, the power to destroy free expression as an instrument for political and social regeneration. Cf. *Mills* v. *Alabama*, 384 U.S. 214.

Preservation of the right of free expression from repressive and arbitrary controls requires at the least that citizens who are finally held to have engaged in federally protected speech escape punishment for it. Citizens are entitled to the constitutional protections afforded by reasoned law, "right" law insofar as full and final adjudication can make it right, not law by fiat. If a citizen disobeys the injunction of a court on the ground that the court's order is inconsistent with constitutional protections of free speech, he must risk punishment; and it will be imposed surely enough if he is wrong. But once it is definitively decided that the court was wrong and the citizen right, imposing punishment will not promote respect for the courts or for the law.

Our principal submission, for these reasons, is that any punishment for violation of an injunctive order forbidden by the First and Fourteenth Amendment guarantees of free expression is itself unconstitutional by force of these same guarantees. However, there are circumstances in the present record which make application of the *Mine Workers* doctrine here particularly vulnerable to this constitutional objection.

First, the Circuit Court's injunctive order restrains free speech under a vague and indefinite formulation that gives no fair warning. The sweeping terms of the injunction overreach a vast range of First Amendment conduct with ambiguous prohibition. See petitioners' vagueness objections to the parading law at pp. 41 to 46 above and to the injunction at pp. 46 to 48 above. Prior Alabama law appears to recognize vagueness of an injunctive order as a

defense to a charge of its violation. See *Ex parte Connor*, 240 Ala. 327, 198 So. 850, 853; *In re Willis*, 242 Ala. 284, 5 So.2d 716, 721. The result could hardly be otherwise under the Due Process Clause, since it is no more fair to punish a man for violating an injunction than for violating a statute[26] which does not adequately inform him what conduct it prohibits.[27] It may perhaps be easier for him to seek advance judicial clarification of the injunction than of the statute, although that is not always so as a matter of state procedure and, in any event, it is ordinarily easier to secure a prosecutor's opinion on a criminal statute than a judge's on an injunction, if efforts at clarification may legitimately be demanded by the state of a vaguely notified putative defendant or contemnor. Whatever may be the case in other areas of regulation, this Court has already rejected the imposition of such a burden by the state in First Amendment contexts. *Dombrowski v. Pfister*, 380 U.S. 479. In those contexts, the Court has always been quick to perceive and to condemn the added repressive force which vagueness and overbreadth lend to regulations that strike at protected expression. E.g., *Thornhill* v. *Alabama*, 310 U.S. 88; *N.A.A.C.P.* v. *Button*, 371 U.S. 415. The same considerations strongly support the view that a state's power to punish violation of an injunction invalid by force of the First Amendment is particularly dangerous, and particularly to be disallowed, where the injunction is as broad and sweeping as the one presented here.

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[26] It has been recognized, in fact, that a large part of this Court's vagueness litigation has involved challenges not to state statutes as written but to glosses put by state judicial opinions on the statutes. See Note, 109 U. Pa. L. Rev. 67, 68 n. 4.

[27] Petitioners again note that the Alabama Court of Appeals, in petitioner Shuttlesworth's appeal from a conviction under Birmingham Code section 1159 based upon the Good Friday march, took the view that the ordinance (hence, necessarily, the injunction enforcing it) did not require that a permit be obtained for that march. See p. 46 above.

Second, the present injunction restrains free speech by compelling its subjection to a discretionary licensing law susceptible of arbitrary and repressive administration. Such an injunctive order to obey a permit requirement delegates complete control of expression to the licensing official. This is significant for several reasons. It makes the injunction not merely void on its face but so palpably void, under decisions of this Court going back to 1938, as to cast grave doubt on the issuing court's concern for the Constitution. It presents an acute and egregious danger of wholesale denial of the rights of free expression. On the other hand, it indicates a relatively insignificant and almost wholly illegitimate state interest in punishing violations of the order. This is not an injunction directed to preventing violence or disorder, or even to preventing demonstrations. It does not prohibit demonstrations, but only demonstrations without a permit. The state's interest in its enforcement, then amounts to nothing more than its interest in demanding compliance with the plainly void permit ordinance—a matter of no constitutional weight because constitutionally condemned—and some general interest in the enforcement of all judicial decrees. Even the latter interest is minimal here, since the court has not itself undertaken to forbid, but only to authorize administrative licensors to forbid, vaguely defined conduct. Realistically, these petitioners violated no judicial ban by marching: there was no such unconditional ban. At most they violated Commissioner Eugene "Bull" Connor's ban on demonstrations; and it is Commissioner Connor, rather than the court, whose control is sought to be enforced by their contempt convictions.

Third, this injunctive order was issued *ex parte* without notice or hearing. This is not a case where petitioners had a fair opportunity to be heard in court before they were

restrained. There was not even any sworn allegation or finding by the Circuit Court that it was impractical to give petitioners notice before issuance of the order. The leaders of the organizations involved were plainly available for service of process and were served with copies of the order a few hours after it was issued. There was no showing of any emergent circumstances justifying an *ex parte* order of indefinite duration without the slightest semblance of adversary procedure or opportunity to defend. Nor was there any provision for speedy judicial hearing of the case after the order was issued. It was, of course, common knowledge among civil rights leaders in Alabama that the National Association for the Advancement of Colored People was enjoined from all activities without any hearing for a long period of years by an *ex parte* "temporary" injunction. *NAACP* v. *Alabama*, 377 U.S. 288. The federal procedures involved in *Mine Workers* were subject to no such possibilities of abuse. Federal Rules of Civil Procedure, Rule 65(b) contains elaborate safeguards not provided by Alabama law. Cf. *Freedman* v. *Maryland*, 380 U.S. 51.

Fourth, the matter of timing, ordinarily critical in civil rights protests as in other forms of political expression, is particularly highlighted by the circumstances in Birmingham in 1963. The injunction against petitioners was calculated and effective to interrupt the momentum of their effort to arouse the conscience of the community and the nation, halting their activities before they could build a broader base of support for their assault on segregation in the city. Moreover, these petitioners are all ministers and their organizations were religiously oriented. The injunction, issued Wednesday night, prevented demonstrations on Good Friday and Easter Sunday, days of special sacramental significance on which church-oriented organi-

zations could hope to attract broad attention to their programs and protests. The injunction subjected their activities to Commissioner Connor's discretion at precisely the moment when repression could be most crippling.[28]

In short, petitioners submit it would be indefensible to extend the *Mine Workers* doctrine to permit punishment of expression under an invalid order, vague and broad in its repression of free speech, palpably unconstitutional on its face, constituting city administrators the censors of the streets, issued *ex parte* without stated justification, and for an indefinite duration, in circumstances which rendered its immediate restraint a crippling blow to an ongoing locally unpopular political movement.

III.

Petitioners King, Abernathy, Walker and Shuttlesworth Were Unconstitutionally Convicted of Contempt for Making Statements to the Press Criticizing the Injunction and Alabama Officials.

On April 11, 1963, petitioner Martin Luther King, Jr. read to the press a document, which was distributed as a "Statement by M. L. King, Jr., F. L. Shuttlesworth, [and] Ralph D. Abernathy" and contained the notation "For Further Information—Phone . . . Wyatt Tee Walker" (R. 410). Walker distributed the document to the press and Shuttlesworth orally "reaffirmed" it (R. 250). The text of the statement criticized Alabama officials and said that the injunction was "unjust, undemocratic and unconstitutional" (R. 409).

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[28] As to petitioners Hayes and Fisher, there is an additional reason why the *Mine Workers* doctrine does not apply. Since they were not parties to the injunctive action, nor represented in it, there was no way in which they could have challenged the injunction except in the defense to these contempt prosecutions.

The City charged that the Statement constituted a contempt of court (R. 85, 89). At trial the judge mentioned it as one of the three incidents presented to him which were the basis for the charge (R. 296).[29] In his decree adjudging these petitioners in contempt, he stated that the petition to require the defendants to show cause charged them with violating the order in the following respects: first, "by their issuance of a press release . . . which release allegedly contained derogatory statements concerning Alabama Courts and the injunctive order of this Court in particular" (R. 420); and, second, by their "participating in and conducting certain alleged parades in violation of an ordinance of the City of Birmingham which prohibits parading without a permit" (*Ibid*). He ruled that the "The Charges . . . constitute past acts of disobedience and *disrespect for* the orders of this Court" (emphasis added) (R. 420). He then found generally and without further specification that "the actions" of petitioners were "obvious acts of contempt, constituting deliberate and blatant denials of the authority of this Court and its order" (R. 422).

The Alabama Supreme Court opinion quotes the press release in full, without indicating what significance the Court attaches to it. The Court also quotes the trial judge's summary of the charges presented (R. 437), but says nothing else about the charge of contempt for making derogatory remarks. The City argued in its brief in the court below that petitioners were "guilty of criminal contempt for publication of the news release" and that the statements "reflected upon the integrity of the Court presided over by Judge Jenkins and other Courts of Alabama

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[29] "The Court: The only charge has been this particular parade, the one on Easter Sunday and the one on Good Friday, and on the question of the meeting at which time some press release was issued. Am I correct in that?

Mr. McBee: Essentially that is correct" (R. 296).

and the South." (Brief of the City of Birmingham in the Supreme Court of Alabama, p. 36). However, the Supreme Court of Alabama never expressly passed on this contention.

On this record, it is evident that the conviction by the trial judge, and perhaps the affirmance on appeal, may have been premised upon the alleged derogatory remarks. Indeed the inference is compelling that the trial judge did regard the issuance of the press release as a ground for the finding of guilt. This inference is particularly strong in the case of the petitioner Walker, who was not shown to have actually marched in either of the demonstrations conducted without a permit, although he was present in the area when the demonstrations occurred.

If, as we urge below, these four[30] petitioners may not constitutionally be punished for publishing the statements made in their press release, their convictions must be reversed. When, as here, a defendant is charged with crime on a number of grounds one of which is unconstitutional, and he is convicted by a general verdict or finding of guilty, his conviction cannot stand. This is plain, since it is impossible to conclude that the conviction does not rest on a constitutionally impermissible basis. *Thomas* v. *Collins,* 323 U.S. 516, 529; *Stromberg* v. *California,* 283 U.S. 359, 367-68; *Williams* v. *North Carolina,* 317 U.S. 287, 291-93; *Terminiello* v. *Chicago,* 337 U.S. 1.

It is the contention of these petitioners that to the extent the contempt judgment was based on the allegedly derogatory statements criticizing the court in petitioners' press release and statement, it plainly violates the rights of freedom of speech, as protected by the due process

[30] The city argued below that petitioner A. D. King might also be punished for the press release. But we are unable to perceive the basis for a claim that he published the release.

clause of the Fourteenth Amendment. *Garrison* v. *Louisiana,* 379 U.S. 64; *New York Times Company* v. *Sullivan,* 376 U.S. 254; *Wood* v. *Georgia,* 370 U.S. 375; *Bridges* v. *California,* 314 U.S. 252; *Pennekamp* v. *Florida,* 328 U.S. 331; *Craig* v. *Harney,* 331 U.S. 367. Cf. *Holt* v. *Virginia,* 381 U.S. 131, and *Re Sawyer,* 360 U.S. 622 (attorneys' criticism). These cases make it clear that courts, no more than other governmental agencies, are not immune from criticism for their acts. As this Court indicated in *Pennekamp,* the only restriction is whether statements might amount to intimidation or coercion of the court so as to make a fair trial impossible. 328 U.S. 334-335. And in *Craig* v. *Harney,* it was said:

> [T]he unequivocal command of the First Amendment serve[s] as [a] constant [reminder] that freedom of speech and of the press should not be impaired through the exercise of [the contempt] power unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice. (331 U.S. at 373.)

For, as the Court indicated, criticism even though unfair and in strong and even intemperate language cannot in and of itself be the basis for a finding of contempt; rather, there must be a danger which immediately impairs the administration of justice. (331 U.S. at 376.)

Turning to the remarks of the petitioners themselves, it is clear that they fall well within the constitutional boundaries set out by these cases. The press release, after reaffirming the petitioners' faith in the federal judiciary, stated, *inter alia*:

> However, we are now confronted with recalcitrant forces in the Deep South that will use the courts to

perpetuate the unjust and illegal system of racial separation.

Alabama has made clear its determination to defy the law of the land. Most of its public officials, its legislative body and many of its law enforcement agents have openly defied the desegregation decision of the Supreme Court. We would feel morally and legally responsible to obey the injunction if the courts of Alabama applied equal justice to all of its citizens . . .

Southern law enforcement agencies have demonstrated now and again that they will utilize the force of law to misuse the judicial process.

This is raw tyranny under the guise of maintaining law and order. We cannot in all good conscience obey such an injunction which is an unjust, undemocratic and unconstitutional misuse of the legal process . . .

Just as in all good conscience we cannot obey unjust laws, neither can we respect the unjust use of the courts . . . (R. 409-410.)

Neither of the courts below made any findings or conclusions appraising this statement in accord with the standards set down in *Craig, Pennekamp,* or the other cases cited above. Nor was there any finding or effort to prove that the statements were false or malicious under the standards set out in *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75.

Particularly in light of the situation in Alabama, petitioners had a right under the First Amendment to say that the injunction was unconstitutional, unjust, and in violation of their rights, and that Alabama officials were

working to support segregation. For some time before the issuance of the injunction, the petitioners had been thwarted in their attempts to carry on peaceful demonstrations protesting the all-pervasive segregation in Birmingham by being arrested by city officials under an ordinance which the Alabama courts themselves have now held unconstitutional and discriminatorily applied. *Shuttlesworth* v. *Birmingham,* 43 Ala. App. 68, 180 So.2d 114 (1965). Similarly, city officials had been active in enforcing, by arrests of peaceful demonstrators, statutes requiring segregation in restaurants, etc., which were blatantly unconstitutional (see Appendix, p. 3a *infra,* and R. 70-81). The official governmental attitude of Alabama towards desegregation and civil rights organizations was a matter of common repute and well known to this Court, and that attitude was enforced fully by the courts of Alabama. See the history of litigation set forth in Mr. Justice Harlan's opinion in *NAACP* v. *Alabama,* 377 U.S. 288. And certainly petitioner Shuttlesworth was well acquainted personally with the use of the courts in Alabama as a vehicle for harassment and intimidation of a leader of the civil rights movement. See, *Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87; *Shuttlesworth* v. *City of Birmingham,* 376 U.S. 339; *Shuttlesworth* v. *City of Birmingham,* 373 U.S. 262; *In re Shuttlesworth,* 369 U.S. 35; *Shuttlesworth* v. *City of Birmingham,* 368 U.S. 959. Therefore, it was wholly legitimate for the petitioners to view the injunction as just one more step in a continuing and consistent policy of Alabama officials, aided and abetted by the state courts, to harass, intimidate and interfere with their lawful and constitutional attempts to rid the state of illegal segregation. For expressing that view in vigorous and forthright language, they cannot be punished by contempt of court or otherwise.

IV.

The Conviction of Petitioners Hayes and Fisher Denied Them Due Process Because There Was No Evidence That They Had Notice of or Knowledge of the Terms of the Injunction.

For a criminal conviction to be constitutionally valid there must be some evidence at least of all of the elements of the crime. See *Thompson* v. *Louisville,* 362 U.S. 199, and similar authorities cited in part II (B) above. Under Alabama law, in order to sustain a conviction of criminal contempt for violation of an injunction by a person who is not a party to an injunctive suit, there must be a finding that he had notice of the injunction and knowledge of its terms and that he willfully disobeyed it. In *Re Willis,* 242 Ala. 284, 5 So. 2d 716, 721 (1941) (defendant Riley discharged from contempt by the Alabama Supreme Court because although he knew of the injunction and acted at the direction of the defendants he was not a party and was not familiar with the order's terms). It is the contention of the petitioners Hayes and Fisher that there was no constitutionally sufficient evidence introduced in the trial court to support a finding of their knowledge of the order's provisions.

Neither petitioner Hayes nor petitioner Fisher was named a party to the bill of injunction or in the injunctive order itself (R. 25-26; 37-38). Further, they were not served with copies of the order until after their alleged violation of it by participating in the march on Easter Sunday, April 14, 1963.[31]

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[31] The Supreme Court of Alabama stated in its opinion that Hayes and Fisher were not served "until after the Sunday march" (R. 445).

The court below relied exclusively on petitioner Fisher's own testimony (R. 304-305)[33] to justify its conclusion that he not only knew of the injunction but understood it. It does appear from other evidence that Fisher attended church meetings on Friday and Saturday, the 12th and 13th of April, at which appeals were made for persons to participate in the walk planned for Easter Sunday (R. 445). However, none of the testimony introduced relative to the Friday and Saturday meetings indicated that there was any discussion of the injunction by the speakers or by others (See, *e.g.*, R. 199-204; 337-38). Apparently, there

[33] "Q. What did you hear about the injunction? What did they tell you about it? A. I only heard about the injunction. It wasn't interpreted to me.

Q. Was it interpreted to you you would probably have to go to jail if you took part in that march or walk? A. Yes, but I didn't see any reason I would have to go.

Q. I understand, but you were not told if you got in that march you would have to go to jail? A. I was told if I walked on the streets of Birmingham I would have to go to jail.

Q. I am talking about this Easter Sunday procession. That is what they were talking about? A. That's right.

Q. And you were told that you would go to jail if you did, or probably would? A. I was never told that.

Q. You understood you would? A. Not for just walking on the streets of Birmingham.

Q. You mean for walking in this procession you didn't understand you would be arrested? A. I didn't understand I would be arrested for walking.

Q. You didn't understand you would be arrested for walking? A. I can't understand it yet.

Q. You didn't understand it then and you don't understand it now? A. That's right.

Q. All right, did anybody say anything to you about who was included in the injunction? A. After I was confined and after the contempt I read it.

Q. You have read the contempt? A. That's right, but I haven't read the injunction yet.

Q. When did you hear about the injunction? A. When did I hear about the injunction?

Q. Yes, not the contempt but the injunction? A. I think I told the detective that interviewed me that I heard about an injunction, about an injunction, not any particular injunction" (R. 304-305).

were only calls for persons to walk. Fisher testified that he "only heard about the injunction" (R. 304) but it was not interpreted to him. He did not understand that any of his activities were enjoined (R. 305). Indeed it is clear that he had only a vague knowledge that some kind of an injunction had been issued which may have restricted the activities of certain people (R. 305). There is no evidence whatsoever that he sufficiently understood the terms of the injunction to have committed a willfull violation of it.

Fisher did testify that he had been told that if he walked on the streets of Birmingham, he would have to go to jail (R. 305). However, large numbers of persons had been arrested for parading without a permit under section 1159 of the City Code in the days before and after the injunction was issued (R. 40, 41, 42). Therefore, there is not the slightest basis for inference that his statement referred to his expectation of being arrested on any other ground than that of the many persons before him. The permit law was, in fact, the ground for his arrest on Easter Sunday.

The evidence with regard to Reverend Hayes was no more persuasive. His conviction for contempt rested primarily on the testimony of Detective Harry Jones of the Birmingham Police Force. Jones testified that Reverend Hayes said that he had knowledge of the injunction but that he was marching in the face of it anyway "for human dignity" (R. 257). Reverend Hayes' testimony indicated that his knowledge of the injunction was extremely limited. He had heard about it only through a television news flash on Good Friday (R. 336). The news flash did not say that the injunction restrained members of the Alabama Christian Movement for Human Rights but only that it was "against demonstrators in Birmingham" (R. 337). He did not inquire about the injunction "because I had not been

enjoined" according to his understanding (R. 337). Again, he had not been served himself and there was no one at the meetings he attended that he felt was able to give him information. He was not one of the leaders or organizers of the march on Sunday (R. 338) and was not an officer of the A.C.M.H.R. (R. 336).[11] Thus, just as in the case of Reverend Fisher, there was no evidence that petitioner Hayes had any knowledge of what the injunction actually prohibited nor evidence from which it could be inferred that he either understood the order or had an opportunity to understand it. Hence his conviction also must be reversed since it rests on no evidence of the necessary elements of criminal contempt.

The Supreme Court of Alabama did reverse the contempt conviction of another participant in the Sunday walk, Reverend N. H. Smith, on the grounds of insufficient evidence (R. 446-47). There was no more evidence against petitioners Fisher and Hayes than there was against Smith. A detective testified that Reverend Smith had said that he knew of the injunction, as did Rev. Hayes (R. 260). Rev. Smith himself testified that he had "glimpsed" about the injunction in the paper and had heard about it once on the radio (R. 310-11). He made no attempt to find out what it was about, although he knew that petitioners King, Abernathy and Shuttlesworth had been enjoined (R. 313-14). Smith further testified that he was on the Board of Directors of one of the enjoined organizations (R. 319).

Despite this testimony, the court below held that the conviction against Smith could not stand, since the injunction restrained acts other than parading and knowledge either of such other enjoined acts or of the injunction generally "would not be knowledge of the injunction against parading" (R. 447). The same reasoning certainly applies

[11] His "speech" on Saturday night (R. 335) was merely a "Gospel Message" (R. 306).

to petitioners Hayes and Fisher, and therefore their convictions must also fall under the rule applied to Smith, since, as the court said of Smith, a finding that they were fully advised of the terms of the injunction "must rest on speculation" (R. 446), and not on evidence. *Thompson* v. *Louisville*, 362 U.S. 199; *Fields* v. *City of Fairfield*, 375 U.S. 248.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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